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Supreme Court, U.S.
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No.....

In The

**SUPREME COURT OF THE UNITED STATES**
**October Term, 1986**

Marco Samayoa, et al.,

*Petitioners*

- v. -

CHICAGO BOARD OF EDUCATION., et al.,

*Respondents*

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether people adversely affected by a consent decree entered without findings of identified discrimination, cannot challenge the decree without showing that every feature of the decree is unconstitutional, where they had no notice and opportunity to participate fully and were denied intervention in the consent decree challenging their exclusion from a public school.

2. Whether in the context of a public school desegregation plan and consent decree, allegedly designed to eliminate segregation in the school system, "racial quotas" require and permit the exclusion of the disfavored children without providing a compelling justification and without providing a meaningful opportunity to attend other integrated schools, (A) regardless of whether a Desegregation Plan and Consent Decree is constitutional or (B) alternatively where the Consent Decree is unconstitutional.

3. Whether, consistent with Due Process, nonparties to a consent decree have an independent right to an adjudication of their claim that a defendant conduct is unlawful.

## PARTIES

Petitioners:

MARCO SAMAYOA, by his mother Estela Samayoa; RANDY JAY LEVINE, by his mother J. Levine; MARTESE BOWMAN, by her mother Lizzie Bowman; ADAN FLEISCHAKER, by his mother Lizzie Fleischaker; MARIZOL PLANES, by her mother Martha Planes; WALTHER GORZELA, by his father Walther Gorzela; ANDREW GARTH HOSSMAN, by his mother Jill Hossman; TIFFANY SELINKO, by her mother Mary Ann Selinko; RAYMOND GROSS by his mother Virginia Tarasano; EMELY DYURASINOVIC, by her parent R. Dyurasinovic; JASON E. NAKUTNY, by his father Roman J. Nakutny; LAYTON HOWARD JR., by his mother Vivian N. Howard; CHELSEA CLEMENTZ, by her mother Hazel Clementz; LYDIA M. FISHER, by her mother C. Fisher; MICHAEL NOVAK, by his mother Maria Novak; JENNIFER BOTICH, by her mother Diane Botich; AUTUM TRACY NORTON, by her mother Peggy E. Norton; MICHAEL D. WACHOWIAK, by his mother Mary Kay Jarvis; KENT POWERS, by his mother Judith Powers; KAREN LEE, by her parent T. Lee.; ARMENOUHIE KASSARDJIAN, by his mother Marie Kassardjian.

Respondents:

BOARD OF EDUCATION OF THE CITY OF CHICAGO, MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, RAUL VILLALOBOS, past president, KENNETH SMITH, SOL BRANDZEL, LUIS SALCES, EDWIN CLAUDIO, ROSEMARY JANUS, MARTHA JANTHO, WILFRED REID, BETTY BONOW, JOHN D. FOSTER, ANGELINE CARUSO, Past Acting Superintendent of Schools, RUTH LOVE, Past Superintendent of Schools, HOWARD M. SLOAN, District 2 Superintendent, Dr. HENRY C. SPRINGS, Past Associate Superintendent, ROBERT GALLAHER, Past Principal of Walt Disney Magnet School, JOHN J. BEAN, Principal of Walt Disney magnet School.

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PETITION FOR A WRIT OF CERTIORARI
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## Opinion Below

The opinion of the Seventh Circuit Court of Appeals sought to be reviewed (App. A, infra) is reported at 798 F.2d 1046. Denial of Petition for Rehearing En Banc, with dissent,

(App. B, infra) is not yet reported. The opinion of the District Court (App. C, infra) is not reported. The District Court dismissed applying the rationale of United States v. Board of Education of Chicago (Johnson III) (App. D, infra) reported at 567 F. Supp. 290 (N.D. Ill. 1983) and United States v. Board of Education of Chicago, reported at 554 F. Supp. 912 (N.D.Ill.) aff'd, 717 F. 2d 378 (7th Cir. 1983).

## Jurisdiction

The opinion of the Court of Appeals for the Seventh Circuit was entered on August 19, 1986. A timely Petition for Rehearing en banc was denied, with dissent, on December 10, 1986 and this petition for certiorari was filed within 90 of that date. This Court's Jurisdiction is invoked under 28 USC sec. 1254 (1).

## Constitutional Provisions and Statutes

The relevant constitutional provisions and

statutes are: U.S.Const. Amends. V and XIV, Section 1; 42 USC sec 1981 and 1983, all of which are set forth seriatim in Appendix E.

## Statement of the Case

### I. THE DISSENTING OPINION

We adopt the statement of the case presented by the Honorable FRANK H. EASTERBROOK together with the Honorable RICHARD A. POSNER, JOHN L. COFFEY and DANIEL A. MANION, in their dissent to the petition for rehearing en banc (App. B, infra):

"Marco Samayoa and other children were admitted to the Walt Disney Magnet School (hereinafter "Disney"), a public elementary school in Chicago. The Consent Decree now governing Chicago's public schools calls for annual revisions of the quotas at each school as the city's racial makeup changes. The number of white students in Chicago continues to fall. The revision effective in the fall of 1981

reduced the quota in force at Disney School and compelled the exclusion of the plaintiffs-American Indians, Cubans, and others of various lineages."

"The panel held, 798 F.2d 1046, (App. A, infra), that the plaintiffs have not stated a constitutional claim. It relied principally on United States v. Board of Education, 567 F. Supp. 290 (N.D. Ill. 1983) (Johnson III), (App. D, infra), which rejected a claim made by black students excluded from schools in Chicago in order to make room for white students. The district court observed in Johnson III that every remedy for segregation entails the drawing of racial lines and that every line will affect some people more than it affects others. 567 F. Supp. at 295. (App. D, infra). Everyone has a racial identity, so if a line could be attacked on the ground that it injured a given person or race, the school board would

be unable to consider race in assigning students to schools. The district court concluded that the way around this difficulty is to require any person objecting to the use of race to attack the Plan as a whole. Id. at 295-6. (App. D, infra). No one may attack any particular line, the court held. The Plan as a whole had been upheld by an earlier opinion of the district court, so Johnson III concluded that the plaintiffs could not obtain relief. The panel endorsed Johnson III, see 798 F. 2d at 1049-50. (App. A, infra)."

The dissent concluded: "The analysis of Johnson III is problematic, however, enough so that our court should review the matter independently."

We add that the exclusion of the children at Disney did not involve the reassignment of students and did not provide them with any meaningful opportunity to attend other

integrated schools. Further, the program at Disney is a unique program.

II. THE PETITIONERS' ASSERTIONS BELOW

Petitioners contended that the Chicago Board of Education (hereinafter "Board"), lacked the power to exclude the children without a compelling justification. They lack said power today and will lack it in the future unless and until some compelling justification is found demonstrating the alleged necessity of the drastic "remedy" of exclusion.

Furthermore, even assuming arguendo, the existence of said compelling justification, the Board did not bother to arrange for Petitioners to attend a different pre-kindergarten school in order to desegregate the school, but sent the children home denying them admission and depriving them of a unique quality integrated education at Disney, and may have deprived them altogether of any integrated education.

The respondents contended that the challenged practices are required by the Desegregation Plan of the City of Chicago and the Consent Decree. Nowhere, however, is there an admission or an adjudication or a finding of any past racial discrimination by the Board, nor is there a finding by the Court that a "remedy" is necessary.

Petitioners asserted that a Desegregation Plan that has a proper constitutional purpose cannot ignore the welfare and the constitutional rights of the concrete individuals. Without a factual determination, the exclusion of the children is beyond the constitutional scope, if any, of the Desegregation Plan and the Consent Decree.

Petitioners asserted that the State is never empowered to violate the inalienable rights of individuals and that at the very least, the claim that the exclusion of the individual

children is a permissible infringement, and an acceptable hardship, and that it is the only relevant and necessary alternative to de facto, societal discrimination, must be subjected to the strictest scrutiny, designed to remedy prior discrimination, and requiring the District Court to make a factual determination that the Board had a strong basis in evidence for its conclusion that such remedial action was necessary. Furthermore, Petitioners had no prior notice of and were not party to the Consent Decree, nor to the designing of the Desegregation Plan, nor were they in privity with, nor were their interests represented by any party.

On July 8, 1982, the court ordered the Board to present a motion to transfer this case before Judge Shadur in reference to Johnson v. Board of Education of City of Chicago, 102 S. Ct. 2223 (1982). But on July 22, 1982 Judge

Shadur denied the motion.

Petitioners also filed a motion for leave to intervene in the Consent Decree suit in order to challenge that decree on its face. The Board opposed the motion on the grounds, among others, that it was untimely and it asserted interests already adequately represented by the Board. The motion to intervene was denied. No appeal was taken.

III. THE DISTRICT COURT DECISION-

The District Court's Order (App. C, infra) granted the Respondent's motion to dismiss relying in the rationale of Johnson III (App. D, infra). The court took the position that court approval of a Desegregation Plan for the entire school system precludes attacks on separate aspects of the Plan, taken in isolation.

IV. THE SEVENTH CIRCUIT DECISION-

The panel concluded that people adversely

affected by a Consent Decree cannot attack the decree without showing that every feature of the decree is unconstitutional.

## Argument

### I. Introduction.

This case involves important questions regarding fundamental rights of individuals to the equal protection of the laws, fairness and due process, and the impact upon those rights of a prior Consent Decree between the Board and the Federal government.

### II. People Adversely Affected By A Consent Decree Can Attack The Decree Without Showing That Every Feature Of The Decree Is Unconstitutional.

We adopt the dissenting opinion as our own for it states accurately our argument.

If the Board of Education, without any prior notice nor participation of the victims, were

to kill the children on the alleged ground that the philosophy of the Desegregation Plan and a provision of the Consent Decree required such killing in order to make room to place other children of other races, this court would certainly hold that such an action is not only brutal, but is at a minimum too burdensome, unnecessary and not narrowly tailored to the valid purpose of the Plan. The Court would not hold the Desegregation Plan unconstitutional, for the Plan cannot possibly require such an unconscionable act, nor would the court say that the deceased children must attack <u>every</u> feature of the decree before finding the action unconstitutional nor will the court say that the deceased children are collaterally attacking the Desegregation Plan because the philosophy of the Plan compels the killing, for this is not true.

We think this analogy drives the point home.

The exclusion of the children is tantamount to killing the opportunity that the excluded children have to receive a quality integrated education and in fact deprived them of a unique quality integrated education at Disney and it may have deprived them of the opportunity to receive any integrated education in other schools of the system. The exclusion is too burdensome and the Desegregation Plan and racial quotas do not and cannot require the same.

The panel permits the shuffling of children from one school to another on account of their race without any factual determination nor any finding that a quota system is an appropriate remedy for any misconduct that may have occurred in Chicago. "Some such finding, based on a likelihood of a violation, is essential before children may be shuffled from one school to another on account of their race." Dissent

(App. B, infra).

It is a fundamental premise of preclusion law that nonparties to a prior action are not bound by the judgment. Sea-Land Services, Inc. v. Gaudet, 414 US 573, 593.

This principle should apply with all the more force to a Consent Decree, which is little more than a contract between the parties, formalized by the signature of a judge, without any adjudication on the merits. Firefighters Local 93 v. City of Cleveland, 106 S. Ct. 3063, 3073-80. Such a decree binds the signatories, but cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree. See dissent on denial of petition for rehearing en banc (App. B, infra).

III. Nonparties Have An Independent Right To An Adjudication Of Their Claim That A Defendant's Conduct Is Unlawful.

There is no suggestion that a Consent Decree to which petitioners were not a party divests federal courts of jurisdiction. The panel did not explain why the plaintiffs must attack the whole decree in order to be heard on their own claims. See dissent to denial to petition for rehearing en banc (App. B, infra): "A doctrine that makes jus tertii claims essential to constitutional litigation has little to recommend it and Article III of the Constitution to condemn it."

IV. Petitioner's Action Do Not Constitute An Impermissible Collateral Attack Upon Any Valid Provision of the Decree.

The appellate panel is of the opinion that in the context of a public school Desegregation Plan, allegedly designed to eliminate

segregation in a school system, "racial quotas" require and permit the exclusion of the disfavored children without providing such students a meaningful opportunity to attend other integrated schools, while other unidentified children occupy their places.

The panel miscontrues the meaning of "racial quotas" in the context of affirmative action programs in light of the recent decisions of the Supreme Court of the United States in Wygant v. Board of Education, 106 S. Ct. 1842 (1986); Local 28 of the Sheet Metal Workers International Association vs EEOC, 106 S. Ct. 3019 and Local 93, International Association of Firefighters vs. City of Cleveland, 106 S. Ct. 3063; United States v. Paradise, ___U.S.____; 47 CCH S. Ct. Bull p. B11776 (No. 85-999), decided February 25, 1987.

The court reasons in substance as follows:

1. The Desegregation Plan and racial quotas require and permit the absolute exclusion of the disfavored children.

2. Petitioners challenge the absolute exclusion of the disfavored children and all racial quotas.

3. Therefore, Petitioners challenge the Desegregation Plan, and it follows that this is a collateral attack that must fail.

We assert that neither the Desegregation Plan of the City of Chicago, nor Racial quotas per se can properly require the absolute exclusion of children from the school system, and we deny that we challenge all racial quotas and the whole Desegregation Plan.

We subscribe with the position taken by Judge Richard A. Posner, in Britton v. South Bend Community School Corp., No. 84-2841 at page 14 of his dissent:

> "I am willing to accept that the equal protection clause means as a practical matter less for whites than for blacks but not that it means nothing at all, which if this decision stands will be the approximate situation in this circuit after today"

This position of Judge Posner is the same position we express when we assert that it is not true that one who accepts a race-conscious admission system cannot complain when racially-based exclusions materialize. This is true because the exclusion that is permitted by the constitution only increases slightly the opportunity of access or the random chances of the favored group while decreasing slightly the random chances or the opportunity of access of the disfavored group, bringing both favored and unfavored groups into parity. The current disparity exists because of some prior and unfair discrimination which creates an unequal distribution of benefits. However, the constitution does not allow the absolute exclusion of any individual. Even disfavored members of a group must still have a chance.

From its very inception petitioners did not object to racial quotas per se, nor to

affirmative action in general. Petitioners state and stand on their statement that "Whether or not the Desegregation Plan and Consent Decree of the City of Chicago is constitutional, exclusion of the children at Disney without providing them with a meaningful opportunity to attend other integrated schools is a violation of their constitutional rights and totally unwarranted and unjustified".

Petitioners' Fourth Amended Complaint, Count I, filed February 3, 1982 asks the court to enjoin defendants from forcing or effectuating the Board's rejection Nexclusion; and implementing across the Board the impermissible use of certain racial quotas; to declare unconstitutional said action rejecting Nexcluding; the children from the school and implementing the impermissible racial quotas; and for an order directing the admission of the children excluded by defendants and for actual

and punitive damages and attorney's fees.

The Fourth Amended Complaint does not ask the court for "entry of a permanent injunction to prohibit the Walt Disney Magnet School from using racial quotas", as asserted by this Court (App. A, infra). The limited challenge made by petitioners is to the exclusion of the children because of the impermissible use of certain racial quotas. Petitioners never contested the use of all but only of certain (or some) racial quotas. This theory of Petitioners was expressed as follows: "Some uses of racial quotas are unconstitutional" while challenging unambiguously the implied Board's assertion that "Some uses of racial quotas are constitutional."

This distinction which the District Court confronted and found difficult to decipher and interpret is completely disregarded by this appellate panel.

We assert that neither the Desegregation Plan of the City of Chicago, nor Racial quotas per se require the absolute exclusion of children from the school system. If that were the case we certainly would be attacking the Desegregation Plan as unconstitutional as a whole.

No justification for the absolute exclusion of the children can be found neither in racial quotas nor in the Desegregation Plan. Improper use or application is totally different from improper purpose. A Desegregation Plan that has a proper constitutional purpose cannot require the absolute exclusion of the children because it "cannot ignore the welfare and the constitutional rights of the concrete individuals."

The absolute exclusion of the children cannot be required by any Desegregation Plan, nor by any racial quota, nor by any affirmative

action plan. Said absolute exclusion of the children violates the Equal Protection Clause of the Fourteenth Amendment, whether or not the Desegregation Plan of the City of Chicago is constitutional.

Petitioners do not have to provide any reasons for their exclusion from the school system. It is Respondents who must explain why the children are excluded and the Chicago officials did not offer such justification and the panel did not discuss any. Neither racial quotas nor the Desegregation Plan approves nor justifies the absolute exclusion of the children from the school system. This is particularly true because at Disney "the uncontroverted testimony shows that in the history of Disney all children who were accepted for enrollment were <u>entitled</u> to attend the School until they moved out of the 7-District area served by the School or left

voluntarily. The Board did not present any witnesses despite numerous opportunities."

In Wygant the Court held that in the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored. The absolute burden imposed on particular identified individuals is too intrusive and not diffused among society generally. Wygant, 106 S. Ct. 1842 (1986).

The effect, injury and burden that this absolute exclusion has on the children would be better presented on the trial on the merits. We cannot present here psychiatric testimony, nor the expenses incurred by the children since petitioners have not yet been afforded the opportunity to present such evidence. We submit, however, that the killing of the opportunity that these children have to receive

a unique quality integrated education at Disney or at any other equivalent school is more than burden enough. The absolute exclusion and privation of a quality integrated education is a most extraordinary burden.

The court states (App. A, infra): "The plaintiffs had been accepted for enrollment but had not actually been enrolled in the school when the racial quotas were changed". The assumption is that the acceptance of the children is of no consequence unless they have been enrolled in the school. That gratuitous assumption is not supported by the record. In the first place the decision to enroll or not is a decision to be taken by the children and the parents of the children. Furthermore, at Disney "the uncontroverted testimony shows that in the history of Disney all children who were accepted for enrollment were entitled to attend the School until they moved out of the school

District area served by the School or left voluntarily. The Board did not present any witnesses despite numerous opportunities."

Since the children believe in affirmative action and are participants in the random selection that applies to all group applicants, said children cannot complain if not selected or accepted. If not selected the only exclusion they experience is a relative exclusion. Said relative exclusion is based on the fact that the random chances of selection have been reduced to the extent that the children of other races are favored by the odds in the lottery. But this is a group effect, not a particular effect pinpointed on an individual.

Once the individual has been accepted, however, the effect of a subsequent exclusion is concentrated on him and not on the group to which he belongs. This is the same effect referred to in Wygant "...in cases involving

valid hiring goals, (where) the burden to be borne by innocent individuals is diffused to a considerable extent among society generally, Wygant, 106 S. Ct. 1842 (1986). And, while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs Nexclusions; impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive, Wygant, 106 S. Ct. 1842 (1986).

Petitioners distinguish between school desegregation cases involving remedies for clearly determined constitutional violations and the use of fixed exclusionary quotas that were held unlawful in University of California Regents v. Bakke, 438 U.S. 265. Petitioners assert that neither the Desegregation Plan of the City of Chicago, nor racial quotas, nor the Consent Decree require the exclusion of

children from Disney nor from any school, since no compelling justification has been shown for such exclusion. Petitioners do not attack the purpose of the Plan and the Consent Decree *per se*, rather they attack the fact that no factual determination nor finding of a compelling justification for its application in excluding the children has been presented. It follows that if there is no attack, there cannot be a collateral attack.

Although the United States Supreme Court has approved the use of racial categories to insure racial integration that does not mean that all quotas are permissible if the aim is good. In the school-desegregation cases attention to race is allowed in order to ascertain whether school boards that had been discriminating wrongfully by race had really ceased to do so. Racial identification is permitted there--*but only to insure that all students, of whatever*

race, received absolutely equal treatment. the distinction between that use of race as counting or as a measure, and the use of racial categories to reintroduce special preference, is sharp and profound. Preferential uses of quota and race, either to exclude or to include, are unconstitutional, unless said quotas have a compelling governmental purpose, and are relevant and necessary to the achievement of said governmental purpose without creating unacceptable hardships and suffering on identifiable individuals (See Powell, J. University of California Regents v. Bakke, 438 U.S. 265, 287-324.

The appellate court is not distinguishing between a school desegregation case involving, as it should, remedies for clearly determined constitutional violations, and the use of racial categories to reintroduce special preferences or detriments.

In the Bakke case 438 U.S. at 300 Justice Powell stated:

"The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. E.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1,28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971); McDaniel v. Barresi, 402 U.S. 39, 28 L. Ed. 2d 582, 91 S. Ct. 1287 (1971); Green v. County School Board, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement[39] . Moreover, the scope of the remedies was not permitted to exceed the extent of the violations. E.g., Dayton Board of Education v. Brinkman, 433 U.S. 406, 53 L. Ed. 2d 851, 97 S. Ct. 2766 (1977); Milliken v. Bradley, 418 U.S. 717, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974); See Pasadena City Board of Education v. Spangler, 427 U.S. 424, 49 L. Ed. 2d 599, 96 S. Ct. 2697 (1976). See also Austin Independent School Sist. v. United States, 429 U.S. 990, 991-995, 50 L. Ed. 2d 603, 97 S. Ct. 517 (1976) (Powell, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification."

Footnote 39 reads as follows:

Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: Offermann v. Nitkowski, 378 F2d 22(CA2 1967); Wanner v. County School Board, 357 F2d 452 (CA4 1966); Springfield School Committee v. Barksdale, 348 F2d 261 (CA1 1965). Of these, Wanner involved a school system held to have been de jure segregated and enjoined from maintaining segregation; racial districting was deemed necessary, 357 F2d, at 454. Cf. United Jewish Organizations v. Carey, 430 U.S. 144, 51 L. Ed. 2d 229, 97 S. Ct. 996 (1977). In Barksdale and Offermann, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. (emphasis ours). See Keyes v. School District No. 1, 413 U.S. 189, 240-250, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973) (Powell, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education. (emphasis ours).

"Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education."

V. In The Alternative The Desegregation Plan And Consent Decree Is Unconstitutional.

The dissenting opinion (App. B, infra) points out that the crux of the matter consists of the annual readjustments of the racial quotas which are not justified as a remedy for an established wrong and which the appellate court has never found to be constitutional. Petitioners adopt such argument as their own. It is not inconceivable that the decree may contain illegal provisions, and/or that the general provisions may be unjustified as applied in this case. This Court has acknowledged that even where Congress has approved a general race-conscious program designed to correct past discrimination, that a "particular application" of a preference may be overinclusive and bestow a benefit on the basis of race that cannot be justified. Fullilove v. Klutznich, 448 US 448, 486 (1980).

VI. The Appellate Court Erred In Failing To Address And Examine The Constitutionality Of The Consent Decree.

The panel said (App. A, infra) at 798 F. 2d at 1049 that "the plaintiffs' argument was adequately addressed in United States v. Chicago Board of Education, 554 F. Supp. 912 (N.D. Ill. 1983), aff'd, 717 F. 2d 378 (7th Cir. 1983)." But the courts opinion at 717 F. 2d 378 was concerned only with the district court's order to the United States to provide additional funds to the Chicago Board of Education. The appellate Court has never passed on the adequacy of the Plan as a whole, on its application to Disney School in particular, or on the feature of the Plan that gave rise to this case-the alteration in the quota every year to reflect changes in Chicago's population. See dissent to denial of petition for rehearing en banc (App. B, infra). This in

spite of the opinion of the Supreme Court of the United States in Johnson v. Board of Education of City of Chicago, 457 U.S. 52 at 53-54 (1982) which reminded the court: "Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals." The Supreme Court expected the appellate court to turn once more to the merits of racial quotas in Chicago's schools. This, the appellate court has not done.

More than 30 years ago the Supreme Court of the United States condemned the "separate but equal doctrine". The court would not sanction the relative exclusion of black children even if they were placed in separate but equal public institutions. Today, this circuit sanctions what can only be called the "separate

and unequal doctrine" for it approves the absolute exclusion and segregation of certain children because of their race, without placing them even in unequal learning institutions.

The children remain excluded, the court refuses to enter a declarative judgment and an injunction declaring their absolute exclusion as unconstitutional. After Disney, in this circuit, the absolute deprivation of a quality integrated education is not offensive nor a heavy burden.

## Conclusion

Petitioners submit that the Petition for Writ of Certiorari should be granted for the reasons aforesaid.

Respectfully submitted,

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APPENDIX A

No 86-1355

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In The
UNITED COURT OF APPEALS
For the Seventh Circuit

MARCO SAMAYOA, et al.,
Plaintiffs-Appellants

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
Defendants-Appellees

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Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 80-4261-Charles R. Norgle, Judge

Decided August 19, 1986*

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Before BAUER, WOOD, Jr., and FLAUM, Circuit Judges.

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* Oral argument on this case was held on November 8, 1985. On February 12, 1986, this court dismissed the appeal for lack of jurisdiction. As the jurisdictional problem had been resolved, on February 28, 1986, plaintiffs filed a new appeal and resubmitted their briefs from the original appeal.

Wood, Jr., Circuit Judge. Plaintiffs' original interlocutory appeal in this case was dismissed for lack of jurisdiction. Samayoa v. Chicago Board of Education, 783 F. 2d 102 (7th Cir. 1986). As the jurisdictional problem no longer exists, the plaintiffs now reassert their appeal from the dismissal of Count I of their complaint. We affirm.

The district court described the case as follows:

> This suit alleges racial discrimination in the operation of the Walt Disney Magnet School, a Chicago public elementary school. . . .
>
> Count I alleges that the defendants, the Chicago Board of Education and various school officials, violated the constitutional rights of a group of Cuban, American-Indian, and white children, aged 3-4. These children were originally admitted to the Walt Disney Magnet School's pre-kindergarten program in June, 1981, but their admission was revoked two months later, after the school district decided to revise the racial composition of the geographic area from which the school draws pupils. (Fourth Amended Complaint, Count I, par. VII). Count I alleges that the defendants' actions were discriminatory

because they revoked the admission of only Cubans, American-Indians and white students.

Count II is based upon the deed for the property on which the school stands. The property was granted by the federal government to the City of Chicago for the purpose of establishing a school; in the deed the city allegedly agreed to comply with title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally-funded programs. (Complaint, Count II, par. XIII). Count II alleges that the revocation of the children's admission to the school violates this contract between the federal government and the city. Paragraph XIV of Count II also alleges a series of other breaches of this contract, e.g. the lay-off of teachers and other staff, an increased student-teacher ratio, budget cuts and other changes allegedly weakening the school's educational program. The complaint alleges that these changes contribute to "white flight" by making the magnet school less attractive and therefore contravene the goals of Title VI.

Count III alleges both a due process and an equal protection violation of the rights of the children whose admissions were revoked. The complaint alleges that on October 20, 1981 the school board held a "purported hearing" regarding the revocation. This hearing did not meet minimum standards of procedural due process, however, according to the complaint. Furthermore, after the hearing the Board subsequently admitted 5 and 6-year olds who were originally rejected with the younger plaintiffs here, but did not give a reason for treating the younger

children differently.

> Plaintiffs seek injunctive relief and specific performance of the deed to prevent the school board from continuing to discriminate against the plaintiff's racial and ethnic groups. Plaintiffs also seek compensatory and exemplary money damages. Although this suit originally was filed as a class action, plaintiffs in their status report now state that it is being brought only on behalf of the plaintiffs in their individual capacities.

In the original appeal this court determined that the district court's dismissal of Count I was not "directed specifically toward the denial of permanent injunctive relief," Samayoa, 783 F. 2d at 104, and the dismissal thus could not be appealed immediately under 28 U.S.C. sec. 1292(a)(1). This court furthermore stated that even accepting the dismissal of Count I as "an effective denial of a permanent injunction so as to make it reviewable by interlocutory appeal," Id., the lack of an emergency or an urgent need to appeal while Count III still remained for trial in the

district court counseled against allowing the appeal of Count I.

Consequently plaintiffs returned to the district court and asked for a dismissal of Count III. The district court dismissed Count III on May 12, 1986. The plaintiffs are here again appealing the dismissal of Count I and urging this court to reverse and remand this case for entry of a permanent injunction to prohibit the Walt Disney Magnet School from using racial quotas, entry of an order directing the immediate admission of children excluded by the racial quotas, and an award of attorney's fees.

We agree with the district court that the rationale of United States v. Chicago Board of Education (Johnson III), 567 F. Supp. 290 (N.D. Ill. 1983), applies here. The plaintiffs in Johnson challenged as unconstitutional the desegregation plan voluntarily adopted by the

Board. The desegregation plan imposed racial quotas and a ceiling on enrollments in two high schools. The plaintiffs were black children and their parents who resided in the attendance areas of the high schools. The plaintiffs asserted that the desegregation plan as applied to the two high schools violated 42 U.S.C. secs. 1981 and 1983 and 20 U.S.C. sec. 1703(c) by restricting minority student admission to these schools solely on the basis of race. The district court in Johnson found that "(s)tripped of rhetoric, plaintiffs' contention is really that (1) each individual aspect of the (desegregation) plan and (2) every impact of every element within it must pass strict constitutional scrutiny." 567 F. Supp. at 295. The Johnson court agreed with the Board that "the narrow and specific relief sought by the Johnson and Milton, plaintiffs was subsumed by that provided in the United States (v. Chicago

Board of Education, 554 F. Supp. 912 (N.D. Ill.), aff'd, 717 F. 2d 378 (7th Cir. 1983),) action, which was brought on behalf of all the minority students in the Chicago public schools." Id. The district court reasoned that the "(i)mplementation of the (Consent) Decree has transformed claims that must be scrutinized against the (desegregation) (p)lan as an entirety." Id. at 296.

Applying this reasoning the Johnson court concluded that the plaintiffs' challenges were collateral attacks on a desegregation plan that had already been found constitutional, and "(a)pproval of the Plan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum, isolated from the other aspects of the Plan." Id. The court stated that the plaintiffs' efforts to inquire further into the Board's motives in instituting the Plan

were unwarranted because "the actions sought to be stigmatized are part of a nondiscriminatory whole." Id. The Johnson court therefore found that the Board was entitled to judgment as a matter of law and dismissed the plaintiffs' claims.

The plaintiffs here attempt to distinguish this case from Johnson, but their arguments are unpersuasive. Plaintiffs point out that the Johnson children were given an opportunity to transfer to another school, were not accepted and then rejected, and were all black children as opposed to the white, Cuban, and American-Indian children involved here. Plaintiffs' main distinction, however, is that the Johnson plaintiffs attacked the desegregation plan as a whole; and the plaintiffs here maintain that they do not challenge the plan as a whole nor are they mounting a collateral attack "on any facet or

part of the same."

The thrust of plaintiffs' suit is, as the issue heading in plaintiffs' reply brief indicates, that the exclusion of the children because of their race violates the Equal Protection Clause of the Fourteenth Amendment." This was the exact argument presented in Johnson,[1] see 567 F. Supp. at 294. The district court therefore was correct in relying on Johnson to determine the outcome here. Moreover, as the Johnson court recognized, the plaintiffs' argument was adequately addressed

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1 In Johnson, the plaintiffs described their claim in the following terms:

> (P)laintiffs' claim is based on the right to equal treatment: the Board's quotas deny black children that reside in the Gage Park and Morgan Park attendance areas the opportunity to attend a neighborhood school when this opportunity is not similarly denied to any white child that resides in these attendance areas, or anywhere else in the city of Chicago. This, plaintiffs urge, is unconstitutional discrimination on the basis of race.
>
> 567 F. Supp. at 294

in United States v. Chicago Board of Education, 554 F. Supp. 912 (N.D. Ill. 1983), aff'd, 717 F. 2d 378 (7th Cir. 1983). In United States, the court held that "(e)ven where there is a disproportionate allocation of burdens (and it should be repeated none has been shown here), the Constitution is not offended unless the disproportion is arbitrary or invidious-unless it stems from purposes other than legitimate plan-development and plan-implementation." Id. at 923.

The district court found that the plaintiffs admitted that the actions complained of in Count I were done to comply with the overall desegregation plan. The district court thus concluded that "Count I challenges an individual aspect of the overall plan, and the rationale of Johnson III applies with equal force to this case." The plaintiffs contend, however, that they never made such an admission

and that they merely stated that the only reason given for the exclusion of the children was the change of racial quotas.

The letter that the plaintiffs received in August 1981 from the Disney school stated:

> (T)he Office of Equal Educational Opportunity of the Chicago Board of Education announced racial guidelines for entering students for Walt Disney Magnet School effective September, 1981. . . .We are sorry to inform you that according to the above Guidelines, your child will not be entering Disney in September but instead has been placed on the Hold List. . . .We sincerely regret any inconvenience this change may cause you but Disney has now been directed to reflect the philosophy and Guidelines of Chicago's current Desegregation Plan.

Plaintiffs claim that the defendants used the desegregation plan "as an excuse but that cannot be the real reason" for their exclusion from the Disney school. The plaintiffs, however, do not provide any other reason for the exclusion, nor do they support their allegations that the "actions of the Board are pretextual, based on deceit and hypocrisy."

Plaintiffs urge this court to require the Board to explain why the guidelines and philosophy of the desegregation plan compel racial quotas and the exclusion of the plaintiffs. The Board, however, need not do that as the use of racial quotas and assignment schedules for students has already been approved in United States v. Chicago Board of Education.

The plaintiffs also argue that even if Johnson does apply to this case, the decision in Johnson was incorrect. The plaintiffs agree with the Johnson court that "(a)pproval of the (desegregation) (p)lan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum," 567 F. supp. at 296. But plaintiffs disagree that "(i)mplementation of the (Consent) Decree has transformed claims of individual constitutional deprivation into claims that must be scrutinized against the

Plan as an entirety." Id. The plaintiffs contend that this statement is "not true in all situations, and certainly it is not true when there is an invidious discrimination as in Disney." The plaintiffs then discourse upon utilitarianism and the relationship between the individual and the whole community, concluding, among other things, that "(t)he Desegregation Plan as a whole cannot ignore the welfare and the constitutional rights of the concrete individuals." Plaintiffs' concerns have been amply addressed in the United States litigation, see 554 F. Supp. at 922-26.

As this discussion illustrates, the plaintiffs are indeed necessarily attacking the desegregation plan as a whole by challenging its effect upon them. We agree with the Johnson court's assessment of this argument:

> So viewed, plaintiffs' contentions do become collateral attacks on a Plan that has passed constitutional muster. This Court has found the burdens of the Plan (in terms of

> students in attendance outside their neighborhood schools) impact in a way strikingly proportional to the racial makeup of the school population as a whole, (United States v. Chicago Board of Education,) 554 F. Supp. at 922-23. Any such outcome must perforce be the result of heavier impact in some places and lighter impact in others-else every component of the system would have to replicate in microcosm what the entire system reflects in macrocosm. And that the Constitution has never mandated, see Id. at 923-24. For that reason plaintiffs' efforts to compel further factual probing into Board's motives are bootless, for the actions sought to be stigmatized are part of a nondiscriminatory whole.

Johnson III, 567 F. Supp. at 296.

Plaintiffs also assert that the defendants have not even complied with the desegregation plan on which they rely. Plaintiffs point to section 2.2 of the "Student Assignment Principles" which provides:

> The Board will implement magnet schools. . . Magnet schools shall contain racial/ethnic goals . .to ensure that their racial/ethnic composition achieves integration-desegregation at a level 15%-35% white (65%-86% minority) by September 1982, with respect to entering grades, and with respect to other grades to the extend (sic) the goal can be achieved without excluding students

presently enrolled.

Part II, Student Desegregation Plan for the Chicago Public Schools, pp. 5-6 (emphasis added). The defendants, however, did not violate section 2.2 by excluding the plaintiffs because the plaintiffs were not "presently enrolled" in Disney. The plaintiffs had been accepted for enrollment but had not actually been enrolled in the school when the racial quotas were changed.

For the reasons stated above, the district court's dismissal of Count I is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In The
UNITED COURT OF APPEALS
For the Seventh Circuit

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Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, Jr., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

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No 86-1355
MARCO SAMAYOA, et al.,
Plaintiffs-Appellants

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
Defendants-Appellees

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Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 80-4261-Charles R. Norgle, Judge

---

Decided December 10, 1986

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiffs-appellants on September 2, 1986, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing in banc.[1] All of the judges on the original panel petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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1 Judges Posner, Coffey, Easterbrook, and Manion voted to grant rehearing in banc. Judge Posner joins in Judge Easterbrook's dissent to the Order of this Court denying rehearing in banc and Judge Coffey joins part two and three of Judge Easterbrook's dissent. Judge Easterbrook's dissent follows this Order.

EASTERBROOK, Circuit Judge, with whom POSNER, Circuit Judge, joins, and COFFEY, Circuit Judge, joins with respect to Parts II and III, dissenting. Marco Samayoa and other children were admitted to the Walt Disney Magnet School, a public elementary school in Chicago. The consent decree now governing Chicago's public schools calls for annual revisions of the quotas at each school as the city's racial makeup changes. The number of white students in Chicago continues to fall. The revision effective in the fall of 1981 reduced the quota in force at Disney School and compelled the exclusion of the plaintiffs-American Indians, Cubans, and others of various lineages."

"The panel held, 798 F.2d 1046, that the plaintiffs have not stated a constitutional claim. It relied principally on United States v. Board of Education, 567 F. Supp. 290 (N.D.

Ill. 1983) (Johnson III), which rejected a claim made by black students excluded from schools in Chicago in order to make room for white students. The district court observed in Johnson III that every remedy for segregation entails the drawing of racial lines and that every line will affect some people more than it affects others. 567 F. Supp. at 295. Everyone has a racial identity, so if a line could be attacked on the ground that it injured a given person or race, the school board would be unable to consider race in assigning students to schools. The district court concluded that the way around this difficulty is to require any person objecting to the use of race to attack the Plan as a whole. Id. at 295-6. No one may attack any particular line, the court held. The Plan as a whole had been upheld by an earlier opinion of the district court, so Johnson III concluded that the plaintiffs could

not obtain relief. The panel endorsed Johnson III, see 798 F. 2d at 1049-50. The analysis of Johnson III is problematic, however, enough so that our court should review the matter independently."

I

The position taken by the panel-that people adversely affected by a consent decree cannot attack the decree without showing that every feature of the decree is unconstitutional-collides with Firefighters Local 93 v. City of Cleveland, 106 S. Ct. 3063, 3073-80 (1986), which was decided after Johnson III and which the panel did not cite. Firefighters holds that for most purposes a consent decree is a contract. See also United States v. Western Electric Co., 797 F. 2d 1082, 1089 (D.C. Cir. 1986). Parties to litigation may not sign contracts, with or without the court's approval, that stipulate away the rights of

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strangers. Secretary of Labor v. Fitzsimmons, No. 84-2827 (7th Cir. Oct. 30. 1986) (en banc), slip op. 25-28. A person is bound by a judicial decree only to the extent he had notice and an opportunity to participate fully. Consent decrees therefore are open to challenge by strangers. See United States v. Jefferson County, 720 F. 2d 1511, 1517-18 (11th Cir. 1983); Ashley v. City of Jackson, 464 U.S. 900, 901-02 (1983) (Rehnquist & Brennan, JJ., dissenting from the denial of certiorari). See also United States v. City of Miami, 664 F. 2d 435 (5th Cir. 1981) (en banc); EEOC v. Safeway Stores, 714 F. 2d 567 (5th Cir. 1983).

So far as strangers to the litigation are concerned, consent decrees are programs voluntarily adopted by the parties. The provisions of the decree may be challenged to the same extent these voluntary programs may be challenged. See Sam Fox Publishing Co. v.

United States, 366 U.S. 683 (1961). We must treat the quota affecting Disney School as a program voluntarily adopted by Chicago's Board of Education, which it is.

If the Board had adopted a resolution imposing a racial quota on Disney School, students excluded from the school could have challenged their exclusion without showing that the Board's entire attendance policy is unconstitutional. A litigant is entitled to challenge governmental acts that apply to him, for the Constitution requires the Board to treat him as a person, and not merely as a member of a group identified by race. The plaintiffs are not pieces to be moved around in a board game, with no redress unless they can show that all of the rules of the game are stacked. A person aggrieved by one discriminatory clause in a statute need not show that every clause is unconstitutional. The

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Supreme Court has held that sections of statutes must be evaluated individually. E.g., Papasan v. Allain, 106 S. Ct. 2932, 2945-47 & n.17 (1986), rejecting an argument that discriminatory implementation of one statutory provision may be madeup for by countervailing effects elsewhere. The Court has rejected "bottom line" defenses in the law of discrimination. Connecticut v. Teal, 457 U.S. 440 (1982) (Title VII of the Civil Rights Act of 1964). The existence of a device that affects people adversely according to their race may not be justified by some other device that benefits other people of the same race. Neither the decree nor the existence of countervailing clauses allows a court to decline to adjudicate a challenge to a particular provision that affects third parties. Yet that is what the panel did. It accepted a "bottom line" defense without

differentiating the rights of the plaintiffs from the interests of racial groups.

The panel did not explain why the plaintiffs must attack the whole decree in order to be heard on their own claims. One potential reason could be that consent decrees bind strangers to the litigation in a way that a plan unilaterally promulgated by the School Board does not, but that reason would be inconsistent with Firefighters. Another reason could be that there is something special about attendance plans for school districts, whether or not embodied in consent decrees, so that plaintiffs must challenge the whole plan. This reason would be inconsistent with the rule forbidding a litigant to raise the rights of others. A doctrine that makes jus tertii claims essential to constitutional litigation has little to recommend it and Article III of the Constitution to condemn it.

II

The district court in Johnson III relied on its earlier holding that the consent decree as a whole is constitutionally appropriate. The panel's reliance on Johnson III suggests that it, too, blessed the consent decree. Yet the panel did not address the constitutionality of the decree or any of its provisions, and this court has never done so before. The panel said (798 F. 2d at 1049) that "the plaintiffs' argument was adequately addressed in United States v. Chicago Board of Education, 554 F. Supp. 912 (N.D. Ill. 1983), aff'd, 717 F. 2d 378 (7th Cir. 1983)." But our opinion at 717 F. 2d 378 was concerned only with the district court's order to the United States to provide additional funds to the Chicago Board of Education. We have never passed on the adequacy of this plan as a whole, on its application to Disney School in particular, or on the feature

of the plan that gave rise to this case-the alteration in the quota every year to reflect changes in Chicago's population.

We have come close twice. Before the entry of the consent decree, we held in Johnson I and Johnson II that Chicago's voluntary quotas were constitutional. Johnson I was vacated with directions to consider mootness. Johnson v. Board of Education, 604 F. 2d 504 (7th Cir. 1979), vacated, 449 U.S. 915 (1980). After remand we reaffirmed the propriety of the quotas on the basis of Johnson I, see Johnson v. Board of Education, 664 F. 2d 1069 (7th Cir. 1981), and the Supreme Court vacated the decision again, this time with an opinion, 457 U.S. 52 (1982). The Court thought the consent decree required a reassessment of the situation. It reminded us (Id. at 53-54): "Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law

of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals." The Supreme Court expected our court to turn once more to the merits of racial quotas in Chicago's schools. But we have not done so. Johnson III was not appealed, and the panel in this case did not examine the question anew.

III

The merits of a case such as this are difficult to assess. Chicago has not been found to have engaged in racial discrimination in operating its schools. It has not confessed to such discrimination. We have not held that a quota system is an appropriate remedy for any misconduct that may have occurred in Chicago. Some such finding, based on a likelihood of a violation, is essential before children may be shuffled from one school to another on account of their race.

McDaniel v. Barresi, 402 U.S. 39 (1971), establishes that a school district may take race into account in devising its own remedy for discrimination in the operation of its schools. It need not wait for a judicial order. But McDaniel grew out of a former dual school system. Chicago was not a dual system. A plan that entails extensive use of race by public officials therefore requires strong justification. See Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986); Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Just how strong is a matter of dispute. The many opinions in Wygant show that the greater the private injury from the government's use of race as a ground of decision, the stronger the justification the government must supply. We must assume that plaintiffs' injury is substantial. Disney School, as a "magnet" school, is supposed to

"attract" students by virtue of superior offerings. It is one of the few public schools in Chicago with a pre-kindergarten program. Doling out opportunities to attend such schools on account of one's membership in a racial group requires justification. Five Justices in Bakke concluded that the use of race to decide who should receive a medical education requires powerful justification. 438 U.S. at 287-91 (Powell, J., joined by Burger, Rehnquist & O'Connor, JJ.), 1852-53 (O'Connor, J.). And see Fullilove v. Klutznick, 448 U.S. 448, 548 (1980) (Stevens, J., dissenting).

Disney school is not a medical school, but it is not fungible with other schools. We cannot say, at least not without evidence, that people who cannot attend Disney School will receive an equivalent education at another of Chicago's public schools. (This is also a reason why the plaintiffs did not need to

attack the consent decree as a whole. The use of racial criteria to assign students so as to eliminate the racial identity of otherwise-identical schools may be justified even thought the use of racial criteria to determine who shall attend an enriched school is not.) A strong justification is required before Chicago may turn people away from this school on the ground that "we already have enough of your kind"-which is roughly what Chicago told these plaintiffs, many of whose "kinds" have heard these words before.

The Chicago officials did not offer such justification here-at least the panel did not discuss any, and Chicago does not offer one in its reply to the petition for rehearing. The dominant theme in both the panel's opinion and the Board of Education's response is: "This has all been decided." But it has not been decided, and the necessary justification has neither

been offered by the Board nor been found sufficient by this court. Chicago's use of racial criteria to decide who shall receive the benefits of a superior school has not received from any court the "strict and searching" examination that is necessary. Bakke, 438 U.S. at 362 (opinion of Brennan, White, Marshall & Blackmun, JJ.). See also Sheet Metal Workers Local 28 v. EEOC, 106 S. Ct. 3019, 3036-37 (1986) (discussing use of racial preferences to "remedy past discrimination" and suggesting that the rationale for such preferences also limits their scope).

There is a further problem. The desegregation plan calls not only for an initial quota to eliminate any racial identity in the schools but also for annual adjustments to keep each school's racial mix in line with that of the whole school district. This sort of plan is similar to the one in Pasadena City

Board of Education v. Spangler, 427 U.S. 424 (1976). Spangler held that the Constitution does not require annual readjustments to keep each school in line with a changing population. Id. at 434-38. This case does not involve a plan imposed on Chicago by a court, but Spangler is relevant because both the parties and the panel have proceeded as if the consent decree were a remedy for an established wrong. The annual readjustment cannot be justified as a remedy. Firefighters holds that consent decrees may include remedies that courts could not impose on unwilling defendants, but it also observed that the concomitant of the parties' ability to go beyond what is required is exposure to the complaints of those injured by the excess. 106 S. Ct. at 3077-78. The excess here raises problems of its own.

The constitutional obligation of public officials is to assign students without regard

to race. When they violate that obligation, and when the schools become racially identifiable as a result, a court may require them to take race into account yet again to undo the racial identities. E.g., Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Columbus Board of Education v. Penick, 443 U.S. 449, 465-67 (1979). This remedy overcomes today's effects of yesterday's wrong. Spangler holds that there is no further obligation to keep each school's racial mix in line with that of the school system as time goes by. See also Swann, 402 U.S. at 22-25. Once the racial identity of the school has been eliminated, the wrong has been dealt with. The remedy extends no further than the effects of the violation. Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1977). No one has suggested that Disney School is now or ever has been racially identifiable as a result of discrimination by

the School Board. The school district therefore is free under the Constitution, so far as the proof in this litigation demonstrates, to use a race-neutral system of assignment, at least at Disney. Riddick v. Norfolk School Board, 784 F. 2d 521 (4th Cir. 1986), cert. denied, 55 U.S.L.W. 3316 (U.S. Nov. 3, 1986) (applying this principle to an entire school system).

Continued use of race in assigning students, when under Spangler the school district is free to act in a race-neutral fashion, raises new problems, and it is potentially a new wrong. It certainly requires a new justification. There is a substantial argument that the provision of this consent decree calling for a continual updating of racial quotas is a new constitutional wrong. Whether the decree compels of just allows Chicago's officials to use racial criteria even after the lingering effects of earlier wrongs (if any) have been

extirpated should not matter.

This court had never passed on the crux of the objection to the provision in the consent decree that caused the plaintiffs to be excluded from Disney School. The provision is open to serious question. The use of race by the government to grant or withhold benefits is too important to be passed in silence. Race has been the Nation's most divisive problem. The treatment of people as representative of groups defined by race, rather than as individuals,is presumptively improper. One lesson now being taught in the public schools of Chicago is that race is more important than talent or dedication or learning potential in deciding who shall receive a superior education. This lesson is regrettable. Perhaps it is a necessary story, to be told for a short and transitional period. But no court has found that the City of Chicago must teach its

youngsters the importance of race or that it has any justification for doing so. Any person turned away by the government on account of his race is entitled to a respectful hearing by a court, a hearing at which the government must supply a powerful justification. Chicago has not offered a justification, and the plaintiffs in this case have not received their due from this court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
- EASTERN DIVISION

MARCO SAMAYOA, et al.,
Plaintiffs-Appellants

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
Defendants-Appellees

---

No. 80-4261-Judge Charles R. Norgle

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ORDER

This suit alleges racial discrimination in the operation of the Walt Disney Magnet School, a Chicago public elementary school. The case comes before the court today on defendant's motion to dismiss plaintiffs' Fourth Amended Complaint, dated approximately Feb. 3, 1982. For the reasons discussed below, the motion is granted as to Counts I and II, but denied as to Count III.

Count I alleges that the defendants, the

Chicago Board of Education and various school officials, violated the constitutional rights of a group of children, aged 3-4. These children were originally admitted to the Walt Disney Magnet School's pre-kindergarten program in June, 1981, but their admission was revoked two months later, after the school district decided to revise the racial composition of the school to reflect changes in the racial composition of the geographic area from which the school draws pupils. (Fourth Amended Complaint, Count I, par. VII). Count I alleges that the defendants' actions were discriminatory because they revoked the admission of only Cuban, American-Indians and white students.

Count II is based upon the deed for the property on which the school stands. The property was granted by the federal government to the City of Chicago for the purpose of establishing a school; in the deed the city

allegedly agreed to comply with Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally-funded programs. (Complaint, (Count II, par.XIII). Count II alleges that the revocation of the children's admission to the school violates this contract between the federal government and the city. Paragraph XIV of Count II also alleges a series of other breaches of this contract, e.g. the lay-off of teachers and other staff, an increased student-teacher ratio, budget cuts and other changes allegedly weakening the school's educational program. The complaint alleges that these changes contribute to "white flight" by making the magnet school less attractive and therefore contravene the goals of Title VI.

Count III alleges both a due process and an equal protection violation of the rights of the children whose admissions were revoked. The complaint alleges that on October 20, 1981 the

school board held a "purported hearing" regarding the revocation. This hearing did not meet minimum standards of procedural due process, however, according to the complaint. Furthermore, after the hearing the Board subsequently admitted 5 and 6-year-olds who were originally rejected with the younger plaintiffs here, but did not give a reason for treating the younger children differently.

Plaintiffs seek injunctive relief and specific performance of the deed to prevent the school board from continuing to discriminate against the plaintiff's racial and ethnic groups. Plaintiffs also seek compensatory and exemplary money damages. Although this suit originally was filed as a class action, plaintiffs in their status report now state that it is being brought only on behalf of the plaintiffs in their individual capacities.

Dismissal of Counts I and II

Count I is dismissed by applying the

rationale of United States v. Board of Education of Chicago (Johnson III), 567 F. Supp. 290 (N.D. Ill. 1983). The Johnson plaintiffs challenged the racial quotas established at two individual Chicago high schools. Judge Shadur held that court approval of a desegregation plan for the entire school system in United States v. Board of Education of Chicago, 554 F. Supp. 912 (N.D. Ill.), aff'd 717 F. 2d 378 (7th Cir. 1983); precludes attacks on separate aspects of the plan, taken in isolation. The court stated,

> The whole Plan desegregates the school system by techniques that individually classify by race and that individually (that is, if a particular technique were the only ingredient in the game plan) might be impermissible under the Constitution. Johnson III, supra at 296.

The court went on to hold that with the entry of the consent decree, claims of individual constitutional deprivation had been transformed into claims that must be scrutinized against the plan as an entirety.

Because individual claims are in reality a collateral attack on the overall plan, which has passed constitutional muster, the individual claims cannot stand. The court therefore granted summary judgment for the Board.

Plaintiffs in the case before us have admitted (most recently in their status report, Dec. 18, 1984, p.1) that the actions complained of in Count I were done to comply with the overall desegregation plan. Thus Count I challenges an individual aspect of the overall plan, and the rationale of Johnson III applies with equal force to this case. Judge Getzendanner made a similar ruling on December 13, 1983 in denying the plaintiff's most recent motion for a preliminary injunction. This court sees no reason to disagree with Judge Getzendanner's ruling and therefore Count I is dismissed.

On August 31, 1981 Judge Getzendanner also

dismissed an earlier complaint in this case which adequately disposes of Count II of the current complaint. In her decision she held that the plaintiffs had not alleged adequately racial discrimination as the cause of the changes made in the Disney School's program. Title VI of the Civil Rights Act of 1964 prohibits a recipient of federal funds from excluding, denying benefits to, or otherwise discriminating against anyone on the basis of "race, color, or natural origin." 42 U.S.C. sec.2000d. Judge Getzendanner reasoned that because the school was fully-integrated, any detrimental changes in its program were borne equally by all races and ethnic groups.

This court agrees with Judge Getzendanner's ruling on the lack of racial discrimination in Count II and further agrees with her analysis of the standing problem. She held that the plaintiffs could not base their claim of racial discrimination on racially-neutral policies

which might cause discrimination in the future by resegregating the school, (the plaintiff's "white flight" allegation) because the injury was too speculative. Even if future damage were certain, the plaintiffs in the instant case lack standing to assert the rights of possible future victims of discrimination because these plaintiffs have suffered no "injury in fact, economic or otherwise." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Therefore we do not have subject matter jurisdiction under Article III of the Constitution, which requires that there be an actual "case or controversy" before the Court.

Count II of the current complaint does not differ significantly from the one dismissed by Judge Getzendanner, except that it is more clearly based upon a theory that plaintiffs are third-party beneficiaries of the deed between the federal and city governments. There is no

violation of the deed, however, if no racial discrimination exists. Because the defendants have violated neither Title VI nor any other federal anti-discrimination statute by their alleged action in Count II, the plaintiffs have failed to state a claim, and Count II is dismissed.

Count III

Count II of the current complaint states a claim upon which relief can be granted. Under normal circumstances, plaintiffs would have no constitutional right to attend a particular school, especially when the Board's refusal to allow them to attend result from a court-sanctioned desegregation plan designed to vindicate constitutional rights. Nevertheless, once the school told the students they were admitted, it may be that a constitutionally protectible property right arose.

"Property" denotes a broad range of interests that are secured by "existing rules

or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Defendants here promised plaintiffs a unique governmental benefit, especially because similar educational programs were not available to children of this age elsewhere in the Chicago public school system. The original admission of the children may not be sufficient, however, to create an "entitlement" to this benefit. A merely subjective "expectancy" is not protected by due process. Perry v. Sinderman, 408 U.S. 593 (1972). Nevertheless, the plaintiffs here should be given an opportunity to prove that the "policies and practices" of the school board created an entitlement through the original admission of the children. Perry, supra.

We do not go as far in this decision as Judge Getzendanner did on October 13, 1981 when she ruled that the "right to attend the school must be viewed as a substantial property right." (Memorandum Opinion, p.6). Our decision allows for the possibility that such a right exists, however.

Once a protectible property interest arises, it cannot be taken away without procedural due process. Therefore, even if the school district revoked the admissions in order to comply with the overall desegregation plan, the way in which they revoked the admissions may violate constitutional standards of due process. Count III alleges that a post-deprivation hearing was held, but that it did not meet minimum due process standards. On a motion to dismiss we must treat the factual allegations of the complaint as true, and view them in the legal light most favorable to the plaintiff. Estelle v. Gamble, 429 U.S. 97 (1976). Viewed in this

light, the facts as alleged in Count III state a claim which cannot be dismissed.

Once discovery has been conducted on this count, however,it may very well be possible to decide its merits on a motion for summary judgment. The court should be able to decide as a matter of law whether an entitlement arose and whether the hearing was adequate.

Furthermore, we find no merit to plaintiff's equal protection claim in Count III because plaintiffs do not constitute a "suspect class" as compared with slightly older children of the same race. Also, plaintiffs may challenge this aspect of the defendants' actions adequately under the due process clause, because the defendants allegedly gave no reason for their action.

In conclusion, Counts I and II of the complaint are dismissed. Plaintiffs have attempted, through five successive complaints, to state a cause of action based upon the same

or similar facts as those alleged in Counts I and II. We remind the plaintiff that under Fed. R. Civ. P. 15(a) a party must request leave of court to amend his pleadings, and this court will not grant leave to plaintiffs to file any further complaints based upon the same theories we have found deficient in this complaint. Count III states a claim, however, at least at this point in time, and will not be dismissed.

IT IS SO ORDERED.

CHARLES R. NORGLE, Judge
U.S. District Court

DATED: 1/28/85

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al,
Plaintiffs

-v.-

BOARD OF EDUCATION OF
THE CITY OF CHICAGO, et al.,
Defendants

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No. 80-C 5124, 76 C 995 and 76 C 996
Judge Milton Shadur
July 14, 1983

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MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

This Court's January 6, 1983 memorandum opinion and order in the United States action (the "Opinion," 554 F. Supp. 912, 928) approved the desegregation plan (the "Plan") developed by the Board of Education of the City of Chicago ("Board") "as being clearly within the 'broad range of constitutionally acceptable

plans'." Final judgment (the "Judgment") upholding the Plan's constitutionality was then entered February 11. Board has now moved for judgment as a matter of law in the Johnson and Milton cases recently consolidated with the United States action, arguing the Opinion and Judgment are dispositive of the constitutional issues raised in Johnson and Milton. For the reasons stated in this memorandum opinion and order Board's motion is granted.

## Background

Some four years ago our Court of Appeals first dealt with the Johnson and Milton actions in Johnson v. Board of Education, 604 F. 2d 504 (7th Cir. 1979). It summarized the relevant factual background, Id. at 507-09, footnote omitted:

> These consolidated civil rights actions for declaratory judgment and injunctive relief were filed on March 15, 1976, challenging as unconstitutional a desegregation plan adopted voluntarily by the Board of Education of the City of Chicago in an effort to arrest the trend toward segregated

enrollments at two Chicago public secondary schools. The challenged desegregation plan, commonly referred to as the "Student Racial Stabilization Quota Plan" ("Plan" in this quotation), established a ceiling on enrollments and imposed racial quotas with respect to admissions at Morgan Park and Gage Park High Schools.

Plaintiffs-appellants in (Johnson) are black children and their parents residing in the Morgan Park High School attendance area. Plaintiffs-appellants in (Milton) are black children and their parents residing in the Gage Park High School attendance area. Plaintiffs' complaints alleged that the Plans, as instituted at Morgan Park and Gage Park High Schools, deprived them of their rights under the Constitution and under title 42 U.S.C. secs. 1981 and 1983, and under Title 20 U.S.C. sec. 1703(c) because the Plans restricted the admission of minority students to these high schools solely on the basis of race...

(Board) filed answers to the complaints, denying the Plans were unconstitutional and denying plaintiffs were deprived of any rights under federal law. (Board) further alleged that plaintiffs had no constitutional right to attend Morgan Park or Gage Park High School since the Board of Education, vested by state statute with the supervision and management of the public school system of the City of Chicago, is empowered to divide the city into attendance areas and to apportion the pupils to the several schools, taking into consideration the prevention of racial segregation in the public schools. In the performance of these statutory duties, the Board contended the

Plans were necessary to alleviate overcrowding and to promote integration at Morgan Park and Gage Park High Schools, both of which had experienced an accelerated change in the size and racial composition of their enrollments as a result of a concomitant demographic change in the residential neighborhoods encompassing the attendance areas of these schools.

On April 29, 1976, three days after the filing of (Board's) answer, plaintiffs in Johnson presented a motion for a temporary restraining order seeking to enjoin the implementation of the Plan at Morgan Park High School, which was scheduled to begin the next day with a lottery drawing to select the incoming freshman class for the fall of 1976. The district court (Will, J.) denied the motion. On August 17, 1976, after extensive discovery by means of interrogatories and document production, plaintiffs filed a motion for a preliminary injunction or in the alternative for summary judgment. On September 27, 1976, the district court denied the alternative motion for summary judgment, but deferred ruling on plaintiffs' motion for preliminary injunction, stating its preference for a modification of the Plans to include a voluntary busing program for students excluded from these two schools to attend alternative integrated high schools.

At the conclusion of discovery, entry of a final pretrial order, stipulation of additional facts and admission of exhibits into evidence, and after both parties agreed to withdraw objections, the parties rested on June 27, 1977. At that time, counsel for the Board advised the court of a pending

modification of the Plans to be acted upon at the next Board meeting. The district court stated it was prepared to find the Plans as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

On July 13, 1977, the Board adopted a modification of the Plans, which provided bus transportation to white or integrated schools from a convenient point near the residences of all students in the Gage Park and Morgan Park attendance areas who were not selected for admission to these two schools under the Plans. By an order of the district court entered August 12, 1977 the Board was directed to implement procedures for publicity and student counseling with respect to the Plans, as modified, and further, to provide that designated spaces at the alternative schools which were not filled by students excluded from one school (e.g., Gage Park) would be made available to students excluded from the other school (e.g., Morgan Park).

On December 30, 1977, the district court entered its findings of fact and conclusions of law, and granted judgment in favor of (Board). The court held that the Plans, as modified to include bus transportation to primarily white or integrated schools for those students not admitted to Gage Park or Morgan Park High Schools, restored to plaintiffs their constitutional rights in that plaintiffs had a meaningful opportunity to attend a Chicago public high school in an integrated setting. The court further ordered that (Board) be enjoined to continue the Plans, as modified.

In affirming the district court's order, the Court of Appeals concluded (Id. at 518):

> Accordingly, in view of the findings on the record of the existence of white flight and the compelling state interest in promoting integration, we hold that voluntary state action directed toward the prevention of de facto segregation in the public schools is constitutionally permissible where, as here, the racial quotas imposed in connection with the desegregation plan provide all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school.

Although the Supreme Court initially granted certiorari, 448 U.S. 910, 100 S. Ct. 3055, 65 L.Ed. 2d 1139 (1980), it later vacated that grant and remanded Johnson and Milton to our Court of Appeals to consider whether the actions were moot in light of (1) Board's decision to rescind the stabilization plans and (2) this Court's September 24, 1980 order approving and entering the Consent Decree (the "Decree") in the United States action. 449 U.S. 915, 101 S. Ct. 339, 66 L.Ed. 2d 162 (1980). See Opinion, 554 F. Suppl. at 913 n. 1. In turn

our Court of Appeals remanded Johnson and Milton to this Court's colleague Judge Will, 645 F. 2d 75 (7th Cir. 1981).

Pending final development of the Plan, Board reinstated its stabilization plans for Morgan Park and Gage Park High Schools in April 1981. In June 1981 Judge Will accordingly found Johnson and Milton were not moot, but he again denied plaintiffs' motion for a permanent injunction against use of the challenged quotas. Our Court of Appeals (1) affirmed Judge Will's finding the cases were not moot and (2) reinstated its earlier opinion in Johnson. 664 F. 2d 1069, 1073 (7th Cir. 1981).

Once again the Supreme Court granted certiorari but then vacated and remanded in a per curiam opinion, 457 U.S. 52, 102 S. Ct. 2223, 72 L.Ed. 2d 668 (1982). It said (Id. at 53-54, 102 S. Ct. at 2224):

> We agree with the Court of Appeals that the case is not moot and that the subsequent development (i.e., entry of the Decree) does

> not undermine that court's original decision upholding the racial quotas. However, since if we were to grant certiorari we would consider the constitutional challenge as an original matter, the subsequent development might well be relevant to that consideration. It was for that reason that we vacated the Court of Appeals' judgment for further consideration in light of the subsequent development. No additional evidence was taken and therefore neither the record nor the District Court or Court of Appeals opinions reflect the subsequent development. We therefore grant certiorari, vacate the judgment, and remand the case with the direction that the matter be consolidated with the ongoing proceeding in the District Court in United States v. Board of Education of Chicago, No. 80-C-5124, so that court may decide petitioners' challenge on the basis of a complete factual record. Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals.

So Johnson and Milton were consolidated with the United States action pending before this Court, and Board's present motion asks this Court to rule on the merits of those actions in light of the "complete factual record" developed in the United States action.

## Clearing the Underbrush

Board's initial brief argued:

1. This Court's Opinion and Judgment necessarily determined the constitutionality of the "controlled enrollment" (that is, quota) provisions of the Plan now governing Morgan Park and Gage Park High Schools (Mem. 6-13).

2. In any event plaintiffs have no constitutional right to attend their preferred school, so no rights are violated by their exclusion or potential exclusion from any particular schools (Id. at 14-16).

Some of Board's language evidently led plaintiffs to believe Board was contending they were bound, in the sense of claim preclusion (res judicata) or issue preclusion (collateral estoppel), by the Opinion and Judgment. Thus plaintiffs' opening argument (Ans. Mem. 1-5) was devoted to making the obvious point res judicata and collateral estoppel principles are not involved here. As Board says (R. Mem. 13-14

& n. *), the real issue is rather whether Johnson and Milton now represent collateral attacks on the Opinion and Judgment.

Board also initially chided plaintiffs for not having petitioned to intervene in the United States action. Mem. 11-13. As plaintiffs correctly respond (Ans. Mem. 5-6), their "failure" to intervene must be read in light of the fact their lawsuits predated the United States action. They simply did not face the situation of potential intervenors, who seek intervention to assert rights they have not previously advanced. Thus the intervention case law cited by Board (Mem. 9-13) cannot alone be dispositive here.[1]

On still another non-issue in the case, plaintiffs do not advance their cause by questioning (Ans. Mem. 10-12) Board's good faith in first adopting its stabilization quota plans and then retaining them in modified form in the Plan.[2] Surely the Supreme Court's

remand of Johnson and Milton for consideration in light of the Decree's implementation calls for evaluation of plaintiffs' claims in the context of what this Court has found are Board's obvious good faith efforts to meet its obligations under the Decree and to this Court.

Plaintiffs have, however, helpfully clarified the nature of their claim (Ans. Mem. 7-8, footnote omitted):

> The Board utterly misconstrues the thrust of plaintiffs' action. Plaintiffs do not claim an independent constitutional right to attend a neighborhood school. Instead, Plaintiffs' claim is based on the right to equal treatment: the Board's quotas deny black children that reside in the Cage Park and Morgan Park attendance areas the opportunity to attend a neighborhood school when this opportunity is not similarly denied to any white child that resides in these attendance areas, or anywhere else in the city of Chicago. This, plaintiffs urge unconstitutional discrimination on the basis of race.

See also R. Mem. 4. It is to that claim this Court now turns.

Synergism: The whole Plan and Its Parts

Plaintiffs' claim of racially unequal

treatment or racially unequal burdens is not literally correct. Board points out (R. Mem. 2 n. ) it has now adopted a controlled enrollment program at an over 65% white enrollment school. And plaintiffs themselves admit (Ans. Mem. 8 n. ) white students may be denied access to their neighborhood schools where those schools have been designated under the Plan for reception of students from outside those neighborhoods: magnet schools, metropolitan high schools or scholastic academies.[3]

That kind of dialogue, however, implies a duty to weigh the Plan's control provisions separately and apart from its other provisions. To avoid any such limited balancing analysis, this opinion will instead indulge a hypothesis more favorable to plaintiffs than the facts justify: that the Morgan Park and Gage Park enrollment controls (viewed in isolation) operate to exclude only neighborhood black students from attending those schools.

Plaintiffs maintain (Ans. Mem. 8-13) such racial classifications must be subjected to constitutional "strict scrutiny," imposing on Board the obligation to prove those classifications are necessary to accomplish a compelling state interest. See Johnson, 604 F. 2d at 515 n. 5. And plaintiffs conclude judgment for Board is precluded because Board has not met that obligation on the present record.

But plaintiffs confuse the question of the level of scrutiny with the question of what is to be scrutinized. Contrary to plaintiffs' assertion (Mem. in Resp. to U.S. Comments 1-5), this Court did not employ a "reduced" level of scrutiny in approving the Plan. True, this Court accorded deference to Board's choice of constitutional means-but only when measured against the yardstick of its strict constitutional obligations. This Court made it plain Board would be held strictly to the

Constitution's requirements (see Opinion, 554 G. Supp. at 915), and the Opinion repeatedly emphasized the Plan was approved only because its provisions were constitutionally permissible, even if the particular remedies chosen were arguable in administrative-judgment terms (Id. at 920, 922, 923).

Stripped of rhetoric, plaintiffs' contention is really that (1) each individual aspect of the Plan and (2) every impact of every element within it must pass strict constitutional scrutiny. As the rest of this opinion reflects, Board's contrary argument (Mem. 8) is both perceptive and persuasive:

> In effect, the narrow and specific relief sought by the Johnson and Milton, plaintiffs was subsumed by that provided in the United States action, which was brought on behalf of all the minority students in the Chicago public schools.

In essence plaintiffs' claim represents another species of the argument for racial balance in all schools, an argument rejected by

the Opinion, 554 F. Supp. at 923. That quest for numerical parity flew in the face of the fact it was simply not feasible-and more important for present terms, is not constitutionally necessary-to desegregate all predominantly minority schools. Id.

What plaintiffs fail (or refuse) to acknowledge is that individual aspects of the Plan, in isolation from one another must necessarily impact disproportionately on white students and minority students. Obviously enrollment controls in a student population that is 60% black on a system-wide basis will more often impinge on blacks than on the 16% white student population. And similarly a particular program or site decision might impact disproportionately on the 20% Hispanic student population.[4] But those points suggest only that it is the whole with which a desegregation plan is necessarily concerned. And it is the whole that must be

constitutionally judged. Cf. Keyes v. School District No. 1, 521 F. 2d 465, 479 (10th Cir. 1975) (finding heavier transportation burden on minority students permissible in context of burdens of overall transportation plan), cert. denied, 423 U.S. 1066, 96 S. Ct. 806, 46 L. Ed. 2d 657 (1976).

Board points (R. Mem. 6, 8-9) to the administrative burden that would be caused if it had to assure each desegregative technique independently met "strict scrutiny." Administrative burdens of course are not dispositive. Far more critical here is the point (Id. at 11-13) that claims like plaintiffs' have in context become collateral attacks on the Judgment. This is not a matter of intervention vel non in the United States action[5] but in terms of legal equivalence plaintiffs' current assertion of their claims is much like seeking to intervene to contest a particular Board decision that implicates

racial factors.[6] Such intervention-such attack-must be gauged in terms of whether the claims arguably contest the constitutionality of the Plan as a whole.

In a corresponding way, this Court's approval in the Opinion and the Judgment must preclude attacks on separate facets of the Plan, taken in isolation. Approval of the Plan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum, isolated from the other aspects of the Plan. That is because the whole really is more than the sum of its parts: The whole Plan desegregates the school system by techniques that individually (that is, if a particular technique were the only ingredient in the game plan) might be impermissible under the Constitution.

Controlling black enrollment in a given school as part of a plan to desegregate an

entire system is just not the same thing as imposing a black quota independently. That is what our Court of Appeals meant when it originally upheld Judge Will's order. 604 F. 2d at 518. That is what plaintiffs themselves really acknowledged when they first asked the Supreme Court to overturn Judge Will and the Court of Appeals (Brief for Petitioners on Writ of Certiorari, No. 79-1356 O.T. 1979, at 15 n.):

> Where a system-wide desegregation effort distributes burdens equitably between the races. . . there is no equal protection violation.

And that is what the Supreme Court must have anticipated when it remanded Johnson and Milton for consolidation with the United States action: Implementation of the Decree has transformed claims of individual constitutional deprivation into claims that must be scrutinized against the Plan as an entirety.

So viewed, plaintiffs' contentions do become

collateral attacks on a Plan that has passed constitutional muster. This Court has found the burdens of the Plan (in terms of students in attendance outside their neighborhood schools) impact in a way strikingly proportional to the racial makeup of the school population as a whole, 554 F. supp. at 922-23. Any such outcome must perforce be the result of heavier impact in some places and lighter impact in others-else every component of the system would have to replicate in microcosm what the entire system reflects in macrocosm. And that the Constitution has never mandated, see Id. at 923-24. For that reason plaintiffs' efforts to compel further factual probing into Board's motives are bootless, for the actions sought to be stigmatized are part of a nondiscriminatory whole.

Accordingly this Court finds the Judgment entitles Board to judgment as a matter of law in Johnson and Milton. Those action are

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accordingly dismissed on the merits with prejudice.

MILTON SHADUR, Judge
U.S. District Court

1 As the later discussion reflects, however, there is a relevant analogy between plaintiffs' assertions and those of the most recent unsuccessful intervenors in the United States action.

2. Board's current quota systems for the two high schools is explained in detail at Plan 84-99, 263-66; School by School Analysis D. 12, 18; and August 1981 Progress Report 136-42. There is no factual dispute in that respect.

3. Moreover, black students barred from Morgan Park and Gage Park High Schools are eligible to transfer to such "magnet" and other integrated programs and schools. Board Mem. 6 n. *.

4. This was the complaint of the most recent effort to intervene, which focused on the Plan's treatment of Harrison High School.

5. This Court had the proposed Plan under advisement for many months to consider both comments by interested parties and, of equal importance, the extent to which the initial implementation appeared to support or to refute Board's projections. Though the Supreme Court's remand came some eight months before the Opinion issued, plaintiffs made no effort to provide the kind of input to the United States action as did other interested parties.

6. See this Court's May 12, 1983 memorandum opinion and order in the United States action (denying a petition to

intervene by students and parents of students of a high school scheduled for closing). This Court of course recognizes the differences between the tests for intervention and the standards applicable to a separate lawsuit against the Board, see United States v. South Bend Community School Corp., 710 F. 2d 394 (7th Cir. 1983). What the text statement refers to is the substantive constitutional test, rather than the procedural hurdles a prospective intervenor must overcome.

# APPENDIX E

## Constitutional Provisions and Statutes

I. Constitution of the United States of America

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. 42 U.S.C.

1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licences, and exactions of every kind, and to no other.

1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

NO. 86 1503

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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MARCO SAMAYOA, et al.,

Petitioners,

vs.

CHICAGO BOARD OF EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

# RESPONDENTS' BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-1503

MARCO SAMAYOA, ET AL.,

Petitioners,

v.

CHICAGO BOARD OF EDUCATION, ET AL.,

Respondents.

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RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Respondents the Board of Education of the City of Chicago, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case. That opinion is reported at 798 F:2d

1046, and is set forth in the Appendix to the Petition.

## Statement of the Case

Disney School ("Disney") was one of the first magnet schools established in the City of Chicago. (R.App. 1a).[1] It was opened pursuant to an agreement with the United States in 1968, which donated the land for Disney to the Board of Education of the City of Chicago ("Board"). The school operated according to this agreement, selecting by lottery a student body reflecting the racial, ethnic and socioeconomic composition

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[1] The following abbreviations for citations are used in this brief; "R.App." refers to Respondents' Appendix; "Pet.App." refers to Petitioners' Appendix; "Petition" refers to the plaintiffs' Petition for a Writ of Certiorari.

of a designated area located on the north side of Chicago which was the Disney attendance zone. (R.App. 507a).

Plaintiffs' claim, in its present incarnation, is an attack on that admission system as it operated in 1981. It has evolved into its present form, as set forth in the Fourth Amended Complaint, through a series of unsuccessful arguments by plaintiffs. With the failure of each argument, new complaints containing slightly modified allegations have been spawned.

This case was initially brought in 1980 on behalf of black and white students in the Disney attendance area. The first Complaint alleged various wrongs in matters of school administration, such as layoffs of

bus aides, which equally affected all students of all races. The admissions system at Disney was not mentioned or attacked. (R.App. 185a). On August 31, 1981, this original Complaint was dismissed. (R.App. 208a).

Following this dismissal, plaintiffs filed on September 11, 1981 their First Amended Complaint. This complaint challenged the racial/ethnic proportions and admissions policy as implemented at Disney for school year 1981-82, and was based on facts which form the underpinnings of all subsequent complaints in this case. (R.App. 236a).

Student selection at Disney for school year 1981-82 was by lottery that was implemented pursuant to a 1973 Board Report which

pertained solely to selection for attendance at Disney. (R.App. 507a). That Report implemented the agreement between the Board and the United States, set a racial/ethnic enrollment composition for the year 1973, and called for annual revisions in incoming classes at Disney to reflect changes in the racial/ethnic composition of the Disney attendance zone. (R.App. 507a). However, for reasons not of record, the enrollment composition at Disney set in 1973 was not annually revised and continued unchanged until 1981. (R.App. 519a).

In June 1981, the Board reviewed the racial/ethnic enrollment composition for Disney and found that the racial/ethnic composition in its attendance zone varied significantly from the 1973 proportions

still in effect. (R.App. 520a). As a result, a revision in the racial/ethnic composition at Disney was recommended to conform with the 1981 racial/ethnic composition of the Disney attendance zone. (R.App. 520a-521a). Subsequently, racial/ethnic adjustments were made in the composition of the 1981 incoming pre-kindergarten class at Disney to reflect the demographic changes which had occurred in the Disney attendance zone between 1973 and 1981.

However, prior to implementation of the revised racial/ethnic enrollment composition at Disney for school year 1981-82, acceptance letters based upon the 1973 enrollment proportions had been sent to students who had applied for September 1981 classes. (R.App. 420a). Plaintiffs, all 3 and 4

years of age in 1981, had received letters of acceptance for the pre-kindergarten program under the 1973 racial/ethnic proportions. After the 1981 revisions were made they were not, however, admitted to Disney. They were notified of this fact and the reasons for it. (R.App. 422a). Plaintiffs were informed that they could reapply for admission to Disney in following years. (R.App. 422a). But the record contains no evidence that plaintiffs made any subsequent attempts to apply for admission at Disney.

The sole basis for the challenge of the Disney admissions system in the First Amended Complaint was the fact that plaintiffs had initially received acceptance letters to attend Disney. (R.App. 236a). Plaintiffs did not challenge the lottery

admissions system at Disney per se or even the 1981 enrollment compositions per se. Plaintiffs claimed that they had a right to attend Disney because of the acceptance letters they had received prior to the 1981 changes in enrollment composition. They challenged only the specific post-acceptance, pre-enrollment modification which resulted in their exclusion from Disney in 1981. (R.App. 268a).

Analyzing the new claims in plaintiffs' complaint, the district court concluded that, even if the allegations were true, the only available remedy would be a due process hearing from the Board. The court informed plaintiffs that unless the admission system itself were attacked, they could obtain no other relief. (R.App. 268a-270a).

On October 21, 1981, plaintiffs amended their complaint a second time and challenged the 1981 racial/ethnic enrollment composition at Disney.[2] (R.App. 278a). Again, plaintiffs stated that the Disney admissions system and enrollment composition per se were not objectionable. (R.App. 364a). However, after a series of unsuccessful motions for preliminary injunction, plaintiffs were given leave to amend their complaint to challenge the 1981 system per se. (R.App. 369a). On February 2, 1982, the

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[2] A Third Amended Complaint was subsequently filed to show that the 5 and 6 year old plaintiffs, who had been included in the First Amended Complaint, had been admitted to Disney and no longer had any legally cognizable interest in the lawsuit. Accordingly, they were, at that time, removed as plaintiffs. (R.App. 313a). No other relevant changes appeared in this pleading.

Fourth Amended Complaint, which is presently before this Court, was filed. (R.App. 374a).

In 1982, after the events forming the basis of plaintiffs' various complaints had occurred, the Board developed and began implementing a systemwide Desegregation Plan. The Plan was adopted following extensive findings of unlawful segregation in the Chicago Public Schools, first by the United States Department of Health, Education and Welfare (R.App. 5a), and then by the Department of Education's Office for Civil Rights. (R.App. 26a, 43a). These findings culminated in the filing of a complaint by the United States against the Board on September 24, 1980 alleging unlawful systemwide segregation. (R.App. 136a). On the same date, the United States and the

Board entered into a Consent Decree (R.App. 150a), pursuant to which the Board agreed to develop, adopt and implement a constitutional Desegregation Plan.

The Desegregation Plan consists of two major components: a student assignment plan under which students voluntarily transfer from their neighborhood schools to other schools within the system; and the educational components designed to compensate for the effects of past segregation in those schools which remain racially identifiable. United States v. Board of Education of the City of Chicago, 554 F.Supp. 912, 916, 926 (N.D. Ill. 1983). The numerous programs comprising this Plan were approved by the

district court as "clearly... constitutionally acceptable". Id. at 928. The district court retained jurisdiction over the Board's implementation of the Plan, and will do so until the Board has remedied the past segregation in the Chicago Public Schools. Id. at 928.

The Board has successfully implemented the Plan systemwide for the past five years. However, because it is subject to the continuing jurisdiction of the district court, each year the Board must conduct reviews and submit reports to the Justice Department and the court detailing the results of these programs, to ensure further desegregation of the Chicago Public Schools. Id. at 918.

As part of the student assignment plan, the Board has designated 45 schools as

magnet schools. These schools offer special educational programs, are intended to draw students from all areas of Chicago, and are designed to result in cooperative and voluntary desegregation. (R.App. 487a). The Plan requires that all magnet schools maintain a racial/ethnic composition of between 15-35% white, without excluding students already enrolled. (R.App. 506a). As a magnet school, Disney's student racial/ethnic composition must now fall within these uniform guidelines.

For school year 1982-83, in compliance with its Desegregation Plan, the Board replaced the admissions system at Disney which was in effect in 1981 when plaintiffs applied for admission. At that time, the

Board instituted at Disney the Plan's uniform magnet school racial/ethnic composition requirements. (R.App. 525a). This new magnet school enrollment system has not been changed since 1982, and will continue as part of the Desegregation Plan. (R.App. 528a, 531a).

Plaintiffs' Fourth Amended Complaint was dismissed on January 28, 1985. (Pet.App. A37). That dismissal was affirmed by a Seventh Circuit panel (Pet.App. A1), and plaintiffs' motion for rehearing en banc was denied. (Pet.App. A16). Plaintiffs then petitioned this Court for review of that dismissal.[3]

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[3] Except for an intervention attempt, the Board was represented throughout the prior proceedings in this case by different counsel than in the desegregation case.

## REASONS FOR DENYING THE WRIT

### I.

### The Issues Stated In The Petition With Respect To The Implementation Of Pre-Desegregation Plan Enrollment Proportions At Disney Are Inappropriate For Review

Though seeking review of the Seventh Circuit's affirmance of the dismissal of their Fourth Amended Complaint, in their Petition for Certiorari plaintiffs have relied on factual assertions which are not found in that complaint and go far beyond its face. The Fourth Amended Complaint alleges facts consisting solely of the events surrounding plaintiffs' efforts to be admitted to Disney in 1981. However, as each of plaintiffs' arguments in the lower courts reached a dead end, plaintiffs groped for new, unpleaded theories to keep their

case alive. They continue to do so. The present result is a convoluted, internally inconsistent Petition which makes reference to the Desegregation Plan and various other "facts" outside the Fourth Amended Complaint, which are irrelevant to the issue on this appeal from the judgment dismissing that complaint. However, when these extraneous layers are recognized and peeled away, it is obvious that plaintiffs have no valid claim.

Simply stated, plaintiffs' claim is moot. Plaintiffs' 1981 exclusion from Disney's pre-kindergarten program, based upon the post-acceptance, pre-enrollment revision of Disney's racial/ethnic enrollment proportions, was a one-time aberration which will not be repeated. And if not

moot, plaintiffs' claim is bound by facts peculiar to the circumstances existing in 1981, and does not present any important legal issue which would merit this Court's consideration.

A. Plaintiffs' Arguments Are Based On Erroneous Statements of Fact

Plaintiffs' arguments obscure the single most important fact in this case: the admissions system which affected plaintiffs was a pre-Desegregation Plan system unique to Disney. It was superseded by the Desegregation Plan in 1982. The 1981 racial/ethnic proportions plaintiffs complain about were not implemented as part of the Desegregation Plan, but pursuant to a 1973 Board Report relating solely to admissions for Disney. This 1981 admissions system has long since been replaced by the

Desegregation Plan's comprehensive magnet school admissions system. According to the Plan, racial/ethnic composition is only reviewed in terms of whites and minorities (without any subgrouping). It is also governed by a racial/ethnic percentage range which is not subject to revision and which is applied, without excluding students already enrolled, uniformly to all magnet schools, including Disney.

Plaintiffs' exclusion from Disney's pre-kindergarten program in 1981 was thus an aberration due to a one-time, post-acceptance, pre-enrollment revision of the school's racial/ethnic composition pursuant to the pre-Desegregation Plan admissions system. It is simply not true, as plaintiffs have argued in their Petition, that

plaintiffs were affected by an annual revision of a Desegregation Plan quota. To the contrary, they were affected solely by the original 1973 Board Report and, although that Report called for annual revisions, it resulted only in a 1981 change in the enrollment composition at Disney. That was the first, last, and only revision ever made to the enrollment proportions initially established by the 1973 Board Report.

In 1982, the admissions system at Disney was made to conform with the Desegregation Plan. The Plan requires that all magnet schools comply with one set of racial/ethnic enrollment proportions. Because the Plan requires that all magnet schools meet a racial/ethnic attendance range which has been unchanged since the

Plan's inception, and because Disney has complied with this requirement since 1982 and has made no revisions in attendance ranges since then, the situation faced by plaintiffs in 1981 will never be repeated. Their claim is thus limited to a single occurrence and is based upon a long obsolete Board Report.

B. Plaintiffs' Claim Is Moot

Stripped of its incorrect arguments and viewed in the context of the facts alleged in the Fourth Amended Complaint, plaintiffs' claim is clearly moot. A case is moot where the allegedly illegal action ceases, United States Department of Treasury v. Galiato, __ U.S. ____, 106 S.Ct. 2683, 2686 (1986) (case moot where statute amended to eradicate offending provision). This is true in

the case of voluntary cessation where there is no reasonable expectation that the alleged wrong will be repeated. DeFunis v. Odegaard, 416 U.S. 312, 318, 94 S.Ct. 1704, 1706-07 (1974).

A claim is also moot where plaintiffs can no longer be affected by the actions complained of. Pasadena City Board of Education v. Spangler, 427 U.S. 424, 430, 96 S.Ct. 2697, 2702 (1976) (appeal in school desegregation case moot as to students who had graduated and as to their parents); Board of School Commissioners of the City of Indianapolis v. Jacobs, 420 U.S. 128, 129, 95 S.Ct. 849, 850 (1975) (suit challenging school board regulations moot as to students who had graduated). This is true in suits

brought as class actions unless a class has been certified. Id.[4]

Here, the 1981 admissions system was superseded in 1982 by the Desegregation Plan enrollment ranges applicable uniformly to all magnet schools. The 1981 change in racial/ethnic proportions at Disney affected only a few students during a single year. The original magnet program under which this one-time change occurred was experimental and the first magnet program in the Chicago Public Schools. Its replacement, the Desegregation Plan, was designed to be, and has

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[4] Moreover, although plaintiffs' complaints allege that they were brought as class actions, they were never certified as class actions. More importantly, plaintiffs' counsel has conceded that this case is not a class action, and that he represents plaintiffs only in their individual capacities. (Pet.App. 40).

been, a lasting program which is being implemented throughout the system. Given that the racial/ethnic ranges set by the Desegregation Plan and applied at Disney are not subject to revision but will remain unchanged, any 1981 "practice" of excluding previously admitted students cannot be repeated in the future. On this ground, plaintiffs' claim is moot.

Moreover, plaintiffs' claim is moot because they can no longer be affected by the 1981 admissions process for pre-kindergarten classes at Disney. This is the only purportedly illegal conduct asserted in the Fourth Amended Complaint. According to this Complaint, all plaintiffs were allegedly 3 and 4 years old in 1981. Thus, they are now 9 and 10 years old, and are

clearly ineligible for admission to Disney's pre-kindergarten program under any set of circumstances.

C. Plaintiffs' Claim Is Fact Bound And Presents No Important Legal Issues

Because plaintiffs' challenge to the 1981 admissions process in their Fourth Amended Complaint fails to raise legal issues of sufficient importance to merit consideration by this Court, the Petition should be denied. As plaintiffs concede in their Petition, they are not attacking the Disney admissions system per se. (Pet. 16). Rather, plaintiffs' entire claim, as pleaded, is based on a purported one-time error in implementation of Disney's 1973 admissions system, which is no longer in effect, resulting in plaintiffs being

accepted but not admitted to Disney's pre-kindergarten program.

In sum, this claim is unique to these few plaintiffs. It is based on an aberration concerning implementation of a superseded selection process at Disney which can not recur or affect other members of the public. Quite simply, plaintiffs' only claim in the Fourth Amended Complaint is bound by facts peculiar to them at a single place and time and does not raise issues of sufficient importance for consideration by this Court.

## II.

## All Remaining Issues Raised In The Petition Concerning The Desegregation Plan Are Also Inappropriate For Review

The several courts which have considered plaintiffs' claims since implementation of the Desegregation Plan have wrongly assumed that the claims also encompass the magnet school enrollment ranges imposed by the Plan. The perplexing question is how these courts ever reached such a conclusion, and how this case ever reached this Court under that theory.[5] The Fourth Amended

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[5] Plaintiffs' assertions concerning the Plan or its enrollment ranges appear to have first been expressed orally and by motion in November 1983 (see and compare R.App. 443a and 482a), and in their November 1983 Motion to Intervene in the independent proceeding concerning the constitutionality and implementation of the Plan. (R.App. 439a, 447a). This occurred long after the

(Footnote continued on next page)

Complaint remains focused upon 1981 pre-Plan enrollment proportions. It asserts only that in 1981 plaintiffs applied for, were admitted to, and were then excluded from Disney by operation of these superseded enrollment proportions. (R.App. 374a). Nothing in this complaint or the Petition provides a legal basis for recasting this moribund claim concerning displaced, Disney specific enrollment proportions into a constitutional attack upon the Board's Desegregation Plan and its use of magnet

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(Footnote continued from previous page) Fourth Amended Complaint was filed in February 1982, and long after the Plan had been approved in January 1983. Based upon plaintiffs' present complaint, the issue of Plan enrollment controls is not even properly before this Court and should not be considered by it.

school enrollment controls generally or their use at Disney in particular.[6]

A. Plaintiffs Lack Standing To Challenge Any Aspect Of The Desegregation Plan

Nothing in the Fourth Amended Complaint, however liberally construed, alleges or suggests that plaintiffs have the requisite standing to challenge the Board's Desegregation Plan and its use of enrollment

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[6] As noted before, plaintiffs have never amended their Fourth Amended Complaint. That complaint focuses upon the 1981 pre-Plan proportions. Plaintiffs have made belated and post-complaint assertions about the Plan and the Plan's magnet schools enrollment ranges solely in motions or briefs. Thus, they managed to confuse the district court and the Court of Appeals into believing that the complaint, and their case, involved in some manner the Board's 1982 and ongoing Desegregation Plan. Like a compass error in navigation, this misguiding has caused the case to arrive in this Court under a theory never pleaded, and not legally cognizable.

ranges at Disney or its other magnet schools as a technique for desegregating the Chicago public schools.[7] As the Court has recognized, plaintiffs must assert facts demonstrating that they have been personally harmed by the practices which they are challenging. It is not sufficient that these practices may have or will in the future harm any class of which plaintiffs are a member or purport to represent. Warth

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[7] Standing is, of course, a constitutional limitation upon the jurisdiction of all federal courts. Since it is the predicate for the power of a court to act, it must exist at all stages of a proceeding. It may be raised at any time. See e.g., DeFunis v. Odegaard, 416 U.S. 312, 319, 94 S.Ct. 1704, 1707 (1974); Safir v. Dole, 718 F.2d 475, 481 (D.C. Cir. 1983), cert. denied, 467 U.S. 1206, 104 S.Ct. 2389 (1984). Hence, it is not relevant that neither the district court nor the Court of Appeals considered this issue, nor that the Board raises it for the first time in this Court.

v. Seldin, 422 U.S. 490, 498-508, 95 S.Ct. 2197, 2205-2210 (1975); see also, Fisher v. Tucson School Dist. No. One, 625 F.2d 834, 837 (9th Cir. 1980) (parents of school children had no standing to challenge "Phase II" of desegregation plan where there was no allegation that their children would be affected by that phase).

Plaintiffs here have never asserted that they applied or reapplied for admission to Disney or any other magnet school after 1981. Thus their claims, or alleged harms, date from prior to the time that the uniform Desegregation Plan enrollment ranges at all magnet schools superseded the Disney-specific racial/ethnic proportions which are the subject of the Fourth Amended Complaint.

Nor do plaintiffs allege that they were excluded from Disney, or any other magnet school or Chicago public school, because of the enrollment ranges established by the Board's Desegregation Plan. Moreover, plaintiffs do not claim that they sustained any harm whatsoever after the Plan was implemented, or as a result of its implementation. In fact, it is not alleged that these plaintiffs have even resided in the Chicago public school district since school year 1981-82, and after the Plan was implemented. (R.App. 374a).

Plaintiffs plead no facts showing that they were affected by the Desegregation Plan or any practices related to it. Absent allegations that they were injured by the

enrollment ranges established by the Desegregation Plan in 1982, and first applied in school year 1982-83, plaintiffs lack the standing necessary to challenge the Board's use of the uniform magnet school enrollment ranges generally since that date. They also lack standing to challenge their use at Disney in particular.

B. Plaintiffs' Fourth Amended Complaint Was Correctly Dismissed

Any claims in the Fourth Amended Complaint relating to the constitutionality of the Board's Desegregation Plan were properly dismissed for two reasons. First, the district court and the Seventh Circuit lacked subject matter jurisdiction to consider, in this case, any issues concerning the Desegregation Plan. Those questions

were already before a different court with continuing jurisdiction over the Plan's implementation. Second, even if the exercise of jurisdiction over plaintiffs' collateral action was correct, the district court and the Court of Appeals rightly concluded that the plaintiffs' claims should be dismissed under the rationale of Johnson v. Board of Education, 567 F.Supp. 290 (N.D. Ill. 1983) ("Johnson III").

1. The District Court and The Seventh Circuit Had No Jurisdiction To Adjudicate Plaintiffs' Claims Concerning The Desegregation Plan

Since 1980 and to the present, continuing jurisdiction over the development, approval, and implementation of the Board's Desegregation Plan has resided in a district court other than the court presiding over

this case.[8] By challenging the constitutionality of the Board's Plan, or particular aspects of it in their Petition, plaintiffs boldly ignore the judgments and continuing jurisdiction of that different court. Any judgment entered in plaintiffs' favor would have overruled or interfered with the jurisdiction of the court retaining control over the Plan, and seriously disrupted the implementation of the Plan itself.

It is well established that a separate suit seeking to attack a desegregation plan

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[8] The Board does not wish to belabor the point, but it is an important one. As stated before, the Fourth Amended Complaint's allegations are based solely upon a pre-Desegregation Plan admissions system. Plaintiffs' arguments relating to the Desegregation Plan or any aspect of it are raised only in their November 1983 Motion to Intervene, their briefs in support of that motion, their appellate briefs and their Petition to this Court.

committed to the jurisdiction of a different court should be dismissed. Courts have consistently recognized that one school district cannot be subjected to competing desegregation plans or imperatives, and that administration over any desegregation plan must be centralized in a single court. They have also held that the court with prior and continuing jurisdiction over the desegregation plan is the only proper forum with the power to entertain objections to the plan.

In one leading case, Hines v. Rapides Parish School Board, 479 F.2d 762 (5th Cir. 1973), the court upheld the lower court's dismissal of an independent class action suit which challenged pupil assignments made in compliance with the desegregation orders

of a separate court. According to that court

> In resolving this appeal, this court must attempt to set out a method which allows parent groups to present their complaints about the school system which results from a desegregation order without fostering a multiplicity of new lawsuits over the same complicated and emotional issues which have already once been fought out in an all too lengthy court battle.
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>
> [T]he proper course of parental groups seeking to question current deficiencies in the implementation of desegregation orders is for the group to petition the district court to allow it to intervene in the prior action.

479 F.2d at 765.

To avoid contradictory results, and the implicit invitation to critics of a desegregation plan to seek a new court to undermine all or part of that plan, courts have repeatedly followed this principle. They have

dismissed independent suits and required plaintiffs to intervene in the main desegregation case. Miller v. Board of Education of Topeka, 667 F.2d 946 (10th Cir. 1982); Burns v. Board of School Commissioners of City of Indianapolis, 437 F.2d 1143 (7th Cir. 1971); Black and White Children of the Pontiac School System v. School District of the City of Pontiac, 464 F.2d 1030 (6th Cir. 1972); Spangler v. Pasadena City Board of Education, 552 F.2d 1326 (9th Cir. 1977); Hayes v. McMillan, 418 F.Supp. 116 (N.D. Tex. 1976), aff'd, 560 F.2d 204 (5th Cir. 1977); Brookins v. South Bend Community School Corp., 95 F.R.D. 407 (N.D. Ind. 1982), aff'd, 710 F.2d 394 (7th Cir. 1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707

(1984) (treating separate lawsuit challenging aspects of desegregation plan as motion to intervene).

In this case, neither the district court nor the Court of Appeals had the power to entertain plaintiffs' independent, collateral suit purporting to attack the Board's Plan. While plaintiffs did move to intervene before Judge Shadur in the main desegregation case (R.App. 439a), that motion was denied (R.App. 485a). Plaintiffs' sole recourse at that point was to appeal the denial of intervention. Burns v. Board of School Commissioners of Indianapolis, 437 F.2d 1143, 1144 (7th Cir. 1971); Hines v. Rapides Parish School Board, 479 F.2d 762, 765-766 (5th Cir. 1973).

After their Motion to Intervene was denied, the district court should have dismissed those separate and collateral claims in which plaintiffs purported to attack the Desegregation Plan, and forced them to appeal the denial of intervention in the main desegregation case. Concomitantly, the Seventh Circuit erred in reviewing plaintiffs' collateral attack on the Plan, and not dismissing this case for lack of subject matter jurisdiction.

Since this Court similarly lacks jurisdiction over those aspects of the Fourth Amended Complaint challenging the Plan itself, the Petition should be denied on that ground alone.

2. Dismissal of Plaintiffs' Claims Directed At The Desegregation Plan Was Correct Under The Rationale Of Johnson v. Board Of Education Of The City Of Chicago

This case was also dismissed by the district court on the ground that plaintiffs' challenge to the present enrollment system at Disney constituted a piecemeal collateral attack on one component of the Desegregation Plan which was barred by the reasoning of Johnson III. In affirming that dismissal, the Seventh Circuit also adopted the rationale in Johnson III.

Contrary to plaintiffs' contentions in their Petition, no court has held that plaintiffs were collaterally estopped from attacking the enrollment system at Disney established by the Desegregation Plan. Johnson III is not about collateral estoppel

at all. Rather, Johnson III is a careful, thoughtful decision concerning the nature of desegregation plans and how they work. As Judge Shadur recognized in Johnson III, an effective and constitutionally adequate desegregation plan is always comprised of numerous interrelated race conscious techniques. As an integrated whole, these techniques are intended to achieve the purpose of systemwide desegregation. It is not constitutionally significant that one technique at one school, viewed alone, involves a racial classification so long as the plan, as a whole, does not burden impermissibly any particular racial group.[9]

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[9] This proposition is so well established that it is axiomatic in considering the constitutionality of a desegregation plan. Implicit in this analysis is that a
(Footnote continued on next page)

Because the Board's desegregation plan, as a whole, had previously been found "clearly... constitutionally acceptable", 554 F.Supp. at 928, the court in Johnson III dismissed a claim, much like that of these plaintiffs, attacking controlled enrollment policies at two schools only. It held that, in the context of a constitutionally

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(Footnote continued from previous page)
plan cannot be parsed to a technique-by-technique, school-by-school, or student-by-student analysis to determine constitutional acceptability. See e.g., Keyes v. School District No. One, 521 F.2d 465, 479 (10th Cir. 1975), cert. denied, 423 U.S. 1066, 96 S.Ct. 806 (1976); Higgins v. Board of Education of Grand Rapids, 508 F.2d 779, 794 (6th Cir. 1974); Davis v. Board of Education of Little Rock, 674 F.2d 684, 687 (8th Cir. 1982), cert. denied, 459 U.S. 881, 103 S.Ct. 178 (1982); Adams v. United States, 620 F.2d 1277, 1296 (8th Cir. 1980); Tasby v. Wright, 585 F.Supp. 453, 455 (N.D. Tex. 1984), aff'd, 771 F.2d 849 (5th Cir. 1985); Arthur v. Nyquist, 473 F.Supp. 830, 840 (W.D. N.Y. 1979). Viewed microcosmically, few if any plans could ever pass such constitutional muster.

approved plan, a challenge to one facet of the plan could not state an equal protection violation.

> [T]his Court's approval of the Plan in the Opinion and the Judgment must preclude attacks on separate facets of the Plan, taken in isolation. Approval of the Plan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum, isolated from the other aspects of the Plan. That is because the whole really is more than the sum of its parts: The whole Plan desegregates the school system by techniques that individually classify by race and that individually (that is, if a particular technique were the only ingredient in the game plan) might be impermissible under the Constitution.

567 F.Supp. at 296 (emphasis in original).

The court in Johnson thus concluded that challenges to individual aspects of the plan alone constituted "collateral attacks" upon a plan that had already been found constitutional. Id. Its reasoning was

straightforward and sensible: since only from the perspective of the whole plan can a court determine whether one of a multitude of techniques is constitutional and contributes to desegregating an entire school system, individualized attacks must necessarily implicate a challenge to the entire plan, all of its techniques and its overall distribution of racial burdens.

Given the systemwide nature of desegregation plans and their various techniques and components, no other approach could be constitutionally proper or feasible because most components involve racial classifications. Extracting for analysis a single plan component means nothing constitutionally. Where a desegregation plan as a whole is constitutionally acceptable, a particular

technique operating in combination with other techniques presumptively contributes to achieving the purpose of systemwide desegregation.

This conclusion makes good sense and is good law. If constitutional violations could be shown because of racial classifications on a technique-by-technique, or school-by-school basis, a constitutionally permissible desegregation plan would be constantly subject to court challenge and possible erosion. Thus, individuals like these plaintiffs could overturn by piecemeal attack at a later date the whole of a constitutionally acceptable desegregation plan by selectively attacking each component.

In this case, plaintiffs' assertions concerning magnet school enrollment ranges

established by the Desegregation Plan at Disney and other schools are nothing more than a collateral attack on an isolated component of a constitutionally acceptable desegregation plan. Stripped from the Plan and viewed in isolation, whether a particular race conscious remedy contributes to the purpose of the Plan as whole cannot be determined. As in Johnson III, because the attack in this case is piecemeal and does not consider the whole Plan, no cause of action exists. Any other result would cripple effective implementation of even the most unintrusive desegregation plan.

## III.

## In The Context of Its System-Wide Desegregation Plan, The Board's Use of Uniform Enrollment Ranges At Disney And All Other Magnet Schools Was Constitutionally Permissible

Since 1982, the Board has been implementing a systemwide desegregation plan to eliminate the wide-spread effects of past segregation in its schools. Plaintiffs have asserted in their Petition that they and all other Chicago public school students are entitled to admission at any magnet school, including Disney, according to a race neutral selection process. This argument ignores that magnet schools are well accepted desegregation techniques and that magnet school enrollment controls are an often used and essential device to ensure

that such schools become and remain integrated. The propriety of student enrollment controls at magnet schools is so well settled and in accord with this Court's prior desegregation decisions that it does not merit this Court's review.

As presented to and approved[10] by the district court, the Desegregation Plan incorporated the use of several interrelated student assignment techniques, including

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[10] The district court's approval of the Plan was not appealed by the United States nor any other person or organization. In the approval process, the district court considered not only the Board's position, but also considered thoroughly the contentions of the United States and several amici curiae organizations representing diverse interests. 554 F.Supp. at 915 and 915 n.3. This unappealed approval reflects the soundness of the Plan and the court's decision and includes, of course, the magnet school provisions in the Board's Plan. Id. at 917.

magnet schools with enrollment ranges, to maximize stably integrated education in the heavily minority Chicago public schools, and to attract white children to predominantly minority schools in minority neighborhoods. In approving the Plan, the district court necessarily concluded that, in this case, the Board's magnet school enrollment ranges were a legitimate and constitutional method of achieving desegregation. 554 F.Supp. at 928.

For the Board, use of a magnet school component is essential to the success of its Desegregation Plan. Its magnet schools are intended to stimulate voluntary, desegregative student transfers. (R.App. 487a). Magnet school components are, moreover, a well-recognized technique for desegregating

a public school system. Liddell v. State Of Missouri, 731 F.2d 1294, 1310-11 (8th Cir. 1984), cert. denied, 469 U.S. 816, 105 S.Ct. 82 (1984) (stating that magnet techniques are used in "at least eighteen cities" and noting ten desegregation decisions approving the use of magnet techniques); 20 U.S.C. § 1713(f).

Legal justification for the use of magnet schools with attendant enrollment ranges, such as the Board's, is clearly found in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 27-28, 91 S.Ct. 1267, 1281-82 (1971), its companion cases[11] and their progeny.[12] Swann and its

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[11] North Carolina State Board of Education v. Swann, 402 U.S. 43, 45-46, 91 S.Ct. 1284, 1286 (1971); McDaniel v. Barresi, 402 U.S. 39, 40-41, 91 S.Ct. 1287,
(Footnote continued on next page)

progeny teach that in the context of a systemwide desegregation plan, no student has a right to attend any particular school or to be admitted to a school absent consideration of the school's racial composition and whether that admission will advance or

---

(Footnote continued from previous page) 1288-89 (1971) (applying Swann principles in the context at a voluntary desegregation plan).

[12] Lower court decisions are uniformly in accord with this Supreme Court precedent. See e.g., Keyes v. School Dist. No. One, 521 F.2d 465, 478 (10th Cir. 1975) cert. denied, 423 U.S. 1066, 98 S.Ct. 806 (1976); Norwalk Core v. Norwalk Board of Education, 298 F.Supp. 213, 223-225 (D. Conn. 1969), aff'd, 423 F.2d 121, 124 (2d Cir. 1970); National Association v. Board of Public Education, 497 F.Supp. 471, 477-478, (N.D. Pa. 1980); Davis v. Board of School Commissioners of Mobile, 393 F.2d 690, 694 and 694 n.5 (5th Cir. 1968); Tasby v. Wright, 542 F.Supp. 134, 136-138 (N.D. Tex. 1982), remanded, Tasby v. Wright, 713 F.2d 90, 97 (5th Cir. 1983); Booker v. Special School District No. 1, 585 F.2d 347, 354 (8th Cir. 1978), cert. denied, 443 U.S. 915, 99 S.Ct. 3106 (1979).

retard desegregation of the school and of the system as a whole. Because the Board is implementing a court approved, systemwide desegregation plan, the preference of these plaintiffs to attend Disney or any other school with a particular racial balance, or to be selected or assigned without regard to race, must yield to the overall purpose of desegregation.

Several courts have also recognized that Swann principles apply to magnet schools. They have held that enrollment ranges, like those imposed by the Board's plan, are necessary to ensure that "voluntary" transfers to magnet schools do not create a segregated magnet school or a dual system of elite schools. The First Circuit, for example, specifically approved

the use of racial quotas in admissions to magnet schools.

> Fundamentally, the magnet schools, in order to prove of value to the desegregation plan, had to be carefully circumscribed [by enrollment quotas] to ensure that they would not serve as a haven for those seeking to attend a school predominantly composed of those of their own race.

Morgan v. Kerrigan, 530 F.2d 401, 423 (1st Cir. 1976), cert. denied, 426 U.S. 935, 96 S.Ct. 2648 (1977)[13].

These decisions thus state the obvious. No student has a right to attend a magnet school of "special quality." Rather, a student has a right only to attend a

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[13] Accord, Davis v. East Baton Rouge Parish School District, 721 F.2d 1425, 1440 (5th Cir. 1983) (following Morgan v. Kerrigan); United States v. Mississippi, 622 F.Supp. 622, 628 (S.D. Miss. 1985); Tasby v. Wright, 520 F.Supp. 683, 745 (N.D. Tex. 1981).

school of adequate quality. When magnet schools are used as a part of a systemwide plan to encourage voluntary desegregation, the purpose of desegregation, rather than providing a specialized curriculum, is the paramount objective. Swann principles concerning student assignments apply equally to all schools in a desegregating school district, including magnet schools. They must do so to ensure that magnet schools work as effective desegregation devices. Under Swann, no student in the context of a desegregation plan has a right to attend a magnet school based on race neutral criteria. To accept plaintiffs' contrary proposition would require this Court to overrule Swann, and exempt from desegregation principles one of the most effective means to engender cooperative

desegregation in public schools.

There is nothing novel, peculiar, or discriminatory about the Board's magnet school enrollment ranges or their use at Disney. The standard enrollment ranges established at Disney and the other magnet schools by the Board's desegregation plan are clearly in accord with the types of ranges uniformly approved by the courts in other school desegregation cases. Given this court's established precedent in Swann, and consistent lower court approval of enrollment ranges at magnet schools, plaintiffs' contentions concerning a "right" to attend Disney, without regard to race, state no unsettled issues which merit this Court's review.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari ought to be denied.

Respectfully submitted,

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86 1503

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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MARCO SAMAYOA, et al.,

Petitioners,

vs.

CHICAGO BOARD OF EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

# APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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APPENDIX TO
RESPONDENTS' BRIEF IN OPPOSITION

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BOARD OF EDUCATION
CITY OF CHICAGO
228 North LaSalle Street
Chicago, Illinois 60601
Telephone DEarborn 2-7800

# REVISED PROPOSAL PRESENTED BY THE BOARD OF EDUCATION OF THE CITY OF CHICAGO TO OBTAIN THE SITE AND FACILITIES OF THE UNITED STATES PUBLIC HEALTH SERVICES HOSPITAL

September 13, 1967

Department of Health, Education and Welfare
Division of Surplus Propergy [sic] - Region V
433 West Van Buren Street, Room 712

Selected Pages
* * * *

## 4. Proposed Program for Facilities Requested

After a number of months of study and evaluation, a group of outside consultants working with members of the staff developed a report entitled "Increasing Desegregation of Faculties, Students and Vocational Education Programs." This report was approved in principle by the Board of Education of the

City of Chicago and forwarded to the U.S. Office of Education. In so doing the Board of Education committed itself to a new and dynamic program of action to realistically cope with problems of racial segregation and quality education.

* * * *

If ever a site was needed by an institution, the site of the United States Public Health Services Hospital is needed by the Chicago Public Schools; moreover, it is urgently needed now.

If the City of Chicago is to become a truly integrated city, if the public schools are to become increasingly integrated and to remain integrated, it is imperative that ways of implementing crucial elements in our report to the U.S. Office of Education - "Increasing Desegregation of Faculties, Students and Vocational Education Programs" - be found now.

One of the important elements in the report designed to help stabilize the city, and to increase integration and improve quality of education, was the establishment of magnet schools. Recommendations were made in the report with respect to criteria for desirable locations for magnet schools. Within the framework of those recommendations, the site under discussion is as nearly perfect for one of the magnet schools as we could ever hope to find. * * * * This site together with one at the extreme southwest corner of the city bordering on a suburban area, and another one in the western section of the city, could be the beginning of a group of at least seven magnet schools. Each school would have a quality program which would draw students from a large region or, perhaps, the total city. Once enrolled, children would continue at the magnet school even though

their home address changes. Thus the possible adverse effects of mobility will be prevented.

The professional consultants who assisted in the preparation of the desegregation report to the U.S. Office of Education described the magnet school in these terms:

> "Magnet schools in all areas would be made especially attractive, physically and academically. They would be staffed on an integrated basis with excellent white and Negro teachers and administrators. The student body not only would be mixed racially but also would include youngsters with intellectual potential who had not yet produced in an academic setting. The magnet schools would be administered flexibly with the principal being free to experiment. Perhaps magnet schools would be established in cooperation with non-public school systems which can and must play a significant role if integration is to be achieved. The educational offerings of the magnet school in a shared time arrangement might attract white families sending children to parochial schools and induce them to remain in the city. Other possible linkages of various types between magnet schools and church related predominantly white schools would be explored aggressively and quickly by the Board."

* * * *

ADMINISTRATIVE PROCEEDING
IN THE
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
NATIONAL SCIENCE FOUNDATION
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| CHICAGO PUBLIC | ) | |
| SCHOOL DISTRICT #299 | ) | DOCKET NO. S-120 |
| (Hereinafter called | ) | |
| "School District") | ) | |
| | ) | |
| and | ) | PROCEEDING UNDER |
| | ) | TITLE VI OF THE |
| ILLINOIS OFFICE | ) | CIVIL RIGHTS ACT |
| OF EDUCATION | ) | OF 1964 |
| (Hereinafter called | ) | |
| "State Agency") | ) | |
| | ) | |
| and | ) | INITIAL DECISION |
| | ) | |
| CITY OF CHICAGO, | ) | |
| ILLINOIS | ) | |
| (Hereinafter called | ) | |
| "City") | ) | |

## PROCEDURAL HISTORY

This proceeding arises under Section 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (Title VI).

On March 23, 1972, the Chicago Public School District #299 (hereinafter called "School District") submitted to the Department of Health, Education and Welfare (hereinafter called "Department") an "Assurance of Compliance with the Department of Health, Education and Welfare Regulation under Title VI of the Civil Rights Act of 1964." Such assurances are mandated under 45 C.F.R. § 80.4 as a condition precedent to approval and extension of any Federal financial assistance. § 80.4 (c) states in pertinent part:

> Every application for Federal financial assistance to carry out a program to which this part applies .... shall .... be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part." [sic]

Pursuant to 45 C.F.R. § 80.7, the "responsible Department official" initiated

a compliance review of the Respondent School District in 1974 to determine whether it was complying with Title VI requirements. (Affidavits of Kenneth Mines and Alanson J. Sumner) The School District was notified by letter from Martin Gerry, Director of the Office for Civil Rights (hereinafter called "OCR"), dated October 6, 1975, that it was in violation of Title VI as to the issues of faculty and professional staff assignment and special bilingual instructional staff assignment and special bilingual instructional services.

On April 9, 1976, a Notice of Opportunity for Hearing (Docket No. S-120) was filed by the Department wherein Respondents School District and Illinois Office of Education (hereinafter called "State Agency") were notified that they would be given an opportunity to be heard concerning

the allegations of noncompliance with Title VI. Issue was joined thereafter and the Respondents requested a hearing before a duly appointed Administrative Law Judge.

On July 30, 1976, the Department of Housing and Urban Development (hereinafter called "HUD") filed a Notice of Opportunity to Request a Hearing (Docket No. 77-1) wherein Respondents School District and City of Chicago (hereinafter called "City") were notified that they would be given an opportunity to be heard concerning allegations of noncompliance with Title VI. On August 18, 1976, the Department submitted a Motion to Join and Consolidate Administrative Proceedings.[1] The proceedings S-120

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1 The Department of Housing and Urban Development assigned all responsibilities under 24 C.F.R. Part 1 relating to all actions for "securing voluntary compliance or related or investigations, compliance reviews, complaints, determinations of

(continued...)

and 77-1 were consolidated by Order of the undersigned on September 9, 1976, pursuant to 45 C.F.R. §§ 80.9(e) and 81.55 and 24 C.F.R. § 1.9 (e) and 2.55.

Upon completion of all pre-trial matters, a hearing date was set for October 13, 1976. In open court on October 13, 1976, the Respondent School District submitted written Notice of Waiver of hearing. Respondents State Agency and City orally supported the Notice. The Department acknowledged the Respondents' right to waive their participation in a hearing and moved the Administrative Law Judge to proceed with a limited unilateral hearing to receive oral testimony from its witnesses. The Court

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1(...continued)
apparent failure to comply and resolutions of matters by informal means" concerning elementary and secondary schools to the Department on May 25, 1966. 35 Fed. Reg. 3233 (1967).

requested written briefs on the matter. On October 27, 1976, the Respondents' Motion (or Notice) for waiver of hearing was granted and the Department's Motion to proceed with a limited unilateral hearing was denied. The Court recognized that the right to a hearing belongs to the Respondent(s) and may be waived by the Respondent(s). 45 C.F.R. §§ 80.8 (c), 80.9 (a) and 81.72 (b). The Department's right to present its case to the fullest was also recognized. The parties were then given a reasonable period of time to submit "any and all affidavits and depositions to clarify and supplement the record." (Order dated October 27, 1976, at 2).

The record for decision was closed on January 31, 1977.

## ISSUES

1. Is the School District in violation of Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000d et. seq.) as a result of its policies and practices relating to lingual instruction of students whose first language is other than English? This will depend upon whether the School District provides adequate lingual instruction to a significant portion of the national origin minority students whose first language is other than English and who require special lingual instruction in order to meaningfully participate in the educational process.

* * * *

## FINDINGS OF FACT

1. The Respondent Board of Education of the City of Chicago is a body politic and corporate organized and existing under state

law, vested with the responsibility of operating the public school system of the City of Chicago.

2. The assignment of teachers and professional staff in the Chicago public school system is completely within the discretionary control and responsibility of the Chicago Board of Education and the General Superintendent of Schools acting for the School District under state law.

3. The Illinois Office of Education is an agency of the Government of the State of Illinois which is vested with responsibility for supervising the policy of and maintaining the systems of public elementary and secondary education which are operated by school districts in the state. In addition, it is the agency which receives, administers, and disburses funds granted to the state by agencies of the United States

Government for educational purposes under various federal statutory grant programs administered by the Department and other federal agencies.

4. The City of Chicago is a body corporate organized and existing under the laws of the state of Illinois and is the agency of local government eligible to receive, administer, obligate and disburse funds granted by the Department of Housing and Urban Development and other federal agencies under various federal statutory grant programs.

5. In 1974, the Office for Civil Rights initiated a compliance review of the Respondent School District to determine whether it was complying with Title VI of the 1964 Civil Rights Act.

6. On October 6, 1975, the School District was notified by letter by the

Director of the Office of Civil Rights that it was in violation of Title VI as to the issues of faculty and professional staff assignment and provision of special bilingual instructional services.

7. A Notice of Opportunity for Hearing was filed on April 9, 1976 wherein Respondents School District and State Agency were notified that they would be given an opportunity to be heard concerning the allegations of noncompliance with Title VI.

8. A Notice of Opportunity to Request a Hearing was filed on July 30, 1976 wherein the School District and City of Chicago were notified that they would be given an opportunity to be heard concerning the allegations of noncompliance with Title VI.

9. On October 13, 1976, the School District submitted a Motion for Waiver of Hearing which was subsequently granted on

October 27, 1976 and the case has therefore been decided upon the record of evidence as constituted on January 31, 1977.

* * * *

33. The Department has provided adequate guidelines in those areas in which the School District has been deficient, made available technical assistance, and rejected on reasonable grounds the School District's February 13, 1976 plan.

34. The School District is a recipient of Federal funds from the Department of Health, Education and Welfare and Department of Housing and Urban Development.

35. Federal financial assistance from the Department applied for and/or received by the School District under the following authorizations are either administered in a discriminatory manner or support programs

which are infected by a discriminatory environment:

[Listing 18 Funding Programs (a) -(r)]

36. Federal financial assistance from the Department of Housing and Urban Development under the following authorizations are either administered in a discriminatory manner or support programs which are infected by a discriminatory environment:

(a) Title I of the Demonstration Center and Metropolitan Development Act of 1966 (42 U.S.C. 3301, et. seq.).

(b) Title I of the Housing & Community Development Act of 1974 (42 U.S.C. 5301, et. seq.).

## CONCLUSIONS OF LAW

1. The Administrative Law Judge by virtue of his designation has full authority to preside over all proceedings in this

matter and to issue an Initial Decision herein.

2. The School District has failed to take the affirmative steps necessary to open its instructional program to its non- or limited-English speaking national origin minority school children in violation of Lau v. Nichols, 414 U.S. 560 (1974) and Title VI of the Civil Rights Act of 1964.

3. The School District has violated Title VI of the Civil Rights Act of 1964 by failing to adequately identify and assess its national origin minority students.

4. The School District's assessment and identification efforts have restricted non- or limited-English speaking national origin minority children from enjoying the benefits of the School District's educational programs in violation of Title VI.

5. The School District is not addressing the needs of approximately 31,000 children enrolled in the School District in violation of Title VI.

6. To separate minority school children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. Brown v. Board of Education, Topeka, 347 U.S. 483 (1854).

7. Two elements must be shown for a finding of actionable de jure segregation: (1) that action or failure to act by responsible school authorities in regard to problems or practices related to segregation was taken with segregative intent and (2) that the action, or failure to act, has resulted in creating, continuing or

increasing the segregation which exists in the school system. Washington v. Davis, 96 S.Ct. 2040 (1976), Milliken v. Bradley, 418 U.S. 717 (1974), Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

8. Intent or purpose to discriminate may be either express or inferred. Village of Arlington Heights v. Metro Housing Dev. Corp., 97 S.Ct. 555 (1977), Austin Independent School District v. United States, 97 S.Ct. 517 (1976), and Washington v. Davis, 96 S.Ct. 2040 (1976).

9. The School District's consciously consummated actions or omissions in regard to the assignment of teachers and professional staff which has resulted in racially identifiable faculties, raises a normal

inference of intent to separate the faculties on the basis of race.

10. The School District purposely assigned teachers and professional staff to certain schools on the basis of race.

11. The cumulative effect of the actions or omissions of the Chicago Public School officials has been to place black administrators, black teachers and black students in a limited number of schools and increasingly to isolate another number of schools with almost exclusively white administrators, white teachers and white students.

12. The responsibility for assignment patterns of teachers and professional staff which made for racially identifiable schools is that of the Respondent School District not of the teachers or personnel being assigned.

13. Under both the Constitutional and the Title VI standard minority school children have been deprived of their right to be educated in a system operated free of racial discrimination in that assignment policies and practices of Chicago Public School officials have made for the racial identifiability of schools as intended for students of a particular race.

14. No correlation between the level of teacher experience at a particular school and the quality of educational services delivered to the students of that particular school has been presented. Accordingly, there is no violation of the Fourteenth Amendment of the Constitution or Title VI of the 1964 Civil Rights Act in regard to the quality of educational services delivered to minority students.

15. No evidence has been presented to establish that teachers in minority schools have lesser levels of teaching experience which affects their proficiency. Accordingly, no violation of the Fourteenth Amendment to the Constitution or Title VI of the 1964 Civil Rights Act exists as to the quality of educational services delivered to minority students.

16. The Department has been unable to secure voluntary compliance of Respondent School District. The Department rejected on reasonable grounds the School District's February 13, 1976 plan, has provided adequate guidelines in those areas in which the School District has been deficient, and has made available technical assistance.

17. The School District is not in compliance with Title VI of the 1964 Civil Rights Act in regard to its teacher and

professional staff assignments and delivery of equal educational opportunities to non- or limited-English speaking national origin minority school children.

ORDER

IT IS HEREBY ORDERED THAT:

1. Federal financial assistance administered by the Department of Health, Education and Welfare under the following authorizations shall be terminated and refused to be granted or continued to the Respondent School District:

* * * *

[listing 18 funding programs (a) - (r)]

2. Federal financial assistance administered by HUD under the following authorizations shall be terminated and refused to be granted or continued to Respondent School District:

(a) Title I of the Demonstration Center and Metropolitan Development Act of 1966 (42 U.S.C. 3301, et. seq.).

(b) Title I of the Housing & Community Development Act of 1974 (42 U.S.C. 5301, et. seq.).

3. Additional Federal financial assistance for which Respondent School District would be eligible to apply for and receive, either directly from HEW or through the Illinois Office of Education, but for its noncompliance with Title VI and the Fourteenth Amendment, are to be refused to be granted.

4. This termination and refusal to grant or continue Federal financial assistance shall remain in force until Respondent School District corrects its noncompliance with Title VI and the Fourteenth Amendment, and satisfies the Director, Office for Civil Rights, HEW that it is in compliance.

5. This Initial Decision and Order shall become final unless, within 20 days after mailing of the Initial Decision and Order, any party submits exceptions to the Reviewing Authority (Civil Rights) of HEW in accordance with 45 C.F.R. 81.103.

DATE: February 15, 1977

EVERETT J. HAMMARSTROM
Administrative Law Judge

U.S. Department of Justice

Civil Rights Division

---

Office of the Assistant Attorney General
Washington, D.C. 20530

4/21/80

Dr. Angeline Caruso
Acting General Superintendent
of Schools
Chicago Board of Education
228 North LaSalle Street
Chicago, Illinois 60601

Dear Dr. Caruso:

On October 28, 1979, the Department of Health, Education and Welfare (HEW) referred the Chicago school case to the Department of Justice for appropriate legal action. HEW has advised us that, despite several months of negotiation following that agency's notice to Dr. Hannon on April 9, 1979, that the Chicago School District was ineligible to receive funding under the Emergency School Aid Act due to ongoing violations of

Title VI of the Civil Rights Act of 1964, the parties have failed to reach agreement on a plan to remedy school segregation in Chicago.

We write to inform you and the Board of Education that both our analysis of the evidence developed by HEW and our independent review of the history of segregation in the Chicago public schools have convinced us that the present segregation of students by race found throughout the district has been caused, in substantial part, by actions and omissions of the Board of Education. Further, we have concluded that these actions and omissions were undertaken with unlawful intent to segregate children on the basis of race.

Specific evidence in support of this conclusion has been presented in the Appendix to HEW's April 9, 1979, letter

referred to above. We believe that the following segregative techniques have contributed substantially to student segregation in Chicago:

(a) The drawing and alteration of school attendance area boundaries in such a way as to institute, maintain or increase racial segregation of students;

(b) The adjustment of grade structures among schools so as to create or maintain racial segregation;

(c) The maintenance of racially segregated branches of schools;

(d) The placement of permanent and temporary facilities to relieve student overcrowding and the failure to use alternative, educationally sound measures to relieve student overcrowding so that, by action and

omission, racial segregation of students was created or maintained;

(e) The maintenance of a racially disproportionate number of severely overcrowded and thereby educationally inferior schools in such a way as to identify, in conjunction with the practices described in the next two subparagraphs, those schools as intended for black students and less crowded schools as intended for white students;

(f) The assignment of teachers and staff to schools in such a way as to match the race of the faculties with the race of the students attending the schools;

(g) The employment of a permissive transfer policy which allowed white students to avoid

attending their schools of assignment when their race was in the minority in favor of attendance at other schools where their race constituted the majority of student enrollment; and

(h) The association of segregated schools with segregated public housing projects.

Through these and other devices, the Board of Education has contributed, over a substantial period of time and in a substantial portion of the schools, to the racial isolation manifest today in the Chicago Public School System.

Based on the facts and applicable law, we have concluded that the Chicago Board of Education has violated Title VI of the Civil Rights Act of 1964 and the assurances the Board made that it would comply with that Title as a condition of the receipt of

federal funds. We have also concluded that the Board's proposals to date to remedy voluntarily this violation have been inadequate and that, unless voluntary compliance can be assured in the manner set out below, it will be necessary for the United States to file suit in the United States District Court for the Northern District of Illinois seeking judicial enforcement of the Board's assurances and an order that the Board develop a desegregation plan that would eliminate the present effects of those violations.

These same conclusions also apply to Title IV of the 1964 Civil Rights Act. This statute authorizes the Attorney General to bring a school desegregation suit when, as is the case here, he has received a complaint signed by parents to the effect that their minor children, as members of a

class similarly situated, are being deprived by a school board of the equal protection of the laws. Although distinct from the Attorney General's authority to sue to enforce the assurances made pursuant to Title VI of the same Act, a Title IV claim would be made in the same suit. The remedy to cure the Title VI violation would suffice for Title IV as well.

We believe the district must commit itself to a plan which will eradicate segregation to the maximum extent feasible in order to remedy the de jure segregation which is prevalent in your public schools. We have reviewed the remedy proposals presented by the Board during its negotiations with HEW and we agree with HEW's assessment that these proposals fall short of legal standards established by the United States Supreme Court. During last

year's term, the Court, in ruling that Columbus and Dayton, Ohio, must fully desegregate their schools, reiterated its prior holding that violations leading to racial segregation in a substantial portion of a school system raise a rebuttable presumption that any existing systemwide segregation resulted from illegal acts, thus justifying a systemwide remedy. The Board, in responding to HEW's allegations, has not rebutted this presumption. This continues to be our position after a careful review of the report submitted on March 27, 1980, by the Board in response to HEW's Appendix. While the response sheds new light on several areas of factual dispute, it fails to dispel our overall conclusion, which is based on both HEW's study and our own, that the Board has intentionally segregated students throughout a substantial portion of

the school system. Thus, we believe that a systemwide remedy is required. The Board's past proposals have been unsatisfactory because they are limited in scope, i.e., they do not provide for the maximum feasible desegregation under the circumstances. Other legal inadequacies in the proposals were detailed in the September 26, 1979, letter to Dr. Hannon from David Tatel, then Director of the Office for Civil Rights, HEW.

We recognize that the development of an adequate desegregation plan for Chicago will be difficult, yet we believe there are a number of constructive and meaningful steps which can be taken. In various factual contexts the federal courts have developed imaginative and flexible relief for desegregating school districts. We would be pleased to assist your Board in

seeking the most effective and least disruptive legal remedy for Chicago. For example, in response to a request from the Board of Education, HEW has also provided a feasibility study which demonstrates one way in which various desegregation techniques can be used to develop a specific plan. We believe a plan modeled after this study would satisfy the Board's legal obligation to remedy the constitutional and statutory violations committed, but we think there are a number of similar ways in which this goal could be accomplished. We are willing to discuss and advise with the Board on the development of such ways.

In enacting the provisions which forbid discrimination by recipients of federal funds and which authorize the Attorney General to bring school desegregation suits, Congress emphasized

that voluntary resolution of differences is preferable to formal enforcement by the federal government. Thus, under Title VI, the funding agency must determine that voluntary compliance by the recipient cannot be attained before taking action. That determination has been made by HEW with respect to your Board of Education. Likewise, Title IV requires the Attorney General to certify that a school board has had a reasonable time to adjust the conditions which amount to a deprivation of the equal protection of the laws.

Although we think that a reasonable time has elapsed, we believe it is consistent with Congress' intent that we determine whether the Chicago Board of Education is now willing to commit itself to the adoption and implementation of an effective desegregation plan without

contesting its liability to do so in court. We are encouraged by the statement in Dr. Hannon's November 26, 1979, letter to me that the Board has asked that additional negotiations on this matter take place.

Public reports of the Board's financial difficulties and the interim economy measures which have been proposed to date have raised a new concern: that, in meeting urgent economic problems, the Board not do anything that will further segregate students in the Chicago public schools, will have a discriminatorily disparate impact on black or other minority students, will make permanent desegregative steps more difficult or more expensive, or will pass up reasonable alternative changes that will be integrative. We are particularly concerned that the cumulative impact of announced school closings will fall disproportionately

on black students and that the modest gains under your Access to Excellence program will be precipitously discarded. Further, we are not satisfied that other closings (and the resulting student re-assignments) could not produce equal if not greater savings.

Thus, we invite the Board to enter into negotiations aimed at reaching an agreement containing the following elements:

(1) An assurance that all school closings, reductions or changes in programs, new construction or other actions resulting in significant changes in student assignment will not be undertaken without a written analysis of their impact on present student segregation or their opportunity to contribute to an effective overall desegregation plan in the future. The impact analysis

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should include a statement setting forth facts which demonstrate that:

(a) The proposed change will not contribute to segregation of students;

(b) The proposed change will not have a disproportionately harmful impact on black and other minority students attending Chicago's public schools;

(c) The proposed change will not make future desegregative changes more difficult or expensive; and

(d) There are no reasonable alternatives to the proposed change which would better serve to correct past segregative assignments.

We also seek an assurance that the Board will not implement any changes

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which the above analysis indicates will have a segregative impact; and

(2) A commitment to the adoption and implementation of a comprehensive desegregation program which is consistent with the principles I have outlined above.

The Board's obligation not to discriminate is a continuing one arising out of both the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Since we are of the view that the Board's previous assurances of nondiscrimination made to the Department of Health, Education and Welfare have not been sufficient to end a variety of racially discriminatory practices, it is our position that the above agreement must take the form of a consent decree so as to be enforceable in the United States District Court for the Northern District of Illinois.

We understand that a new Board of Education will be formed soon. We look forward to working with the new Board in a search for a solution to this most difficult problem that will be consistent with both our law enforcement responsibilities and the vitality of the Chicago school system. We are available for any further information or clarification of our position that you may need. Thomas P. Sullivan, the United States Attorney for the Northern District of Illinois, concurs with the Attorney General's views on this matter and has stated his desire to be fully involved in the negotiations in this matter. We suggest that we meet with you or your representatives within a week or two, either in Washington or Chicago, to begin discussions. Our goal is to arrive at a settlement by early summer if we are to

avoid going to court to resolve this matter.

Sincerely,

Drew S. Days III
Assistant Attorney General
Civil Rights Division

UNITED STATES DEPARTMENT OF EDUCATION
ASSISTANT SECRETARY FOR
ELEMENTARY AND SECONDARY EDUCATION
WASHINGTON, D.C. 20202

JUNE 12, 1980

Dr. Angeline Caruso
Interim General Superintendent of Schools
Chicago Board of Education
228 North LaSalle Street
Chicago, Illinois 60601

Dear Dr. Caruso:

I have completed a review of the information submitted by the Chicago Public School District in response to the determination of ineligibility for Emergency School Aid Act (ESAA) funds set forth in my letter of February 28, 1980. This review included an analysis of the two documents presented at the show cause meeting on March 27, 1980, entitled Response of the Chicago Public School District to the Department of Health, Education and Welfare's Determination of

Ineligibility for 1980 ESAA Funds (Response) and Supplement to the Response (Supplement). In addition, it included an examination of the civil rights compliance data required of all ESAA applicants and the additional information requested by the Office for Civil Rights (OCR) to ensure that the district implemented the remedial plans developed during the last year's waiver of ineligibility negotiations. Portions of this data and other information were submitted on March 27, April 7, and May 5, 6, 19 and 27, 1980.

I regret to inform you that, based on this review, I cannot revoke the two principal bases for the determination of ineligibility in my earlier letter. These two bases of ineligibility are as follows:

1) The plan submitted with the district's basic grant application -- Access to

Excellence -- is not the type of plan for which basic grant funds may be awarded. It does not meet the requirements of section 606(a) of the Act, as interpreted by section 185.11 of the implementing regulations.

2) The district is ineligible for both a basic and a magnet grant under the ESAA because it continues to operate racially segregated and overcrowded schools in violation of section 606(c)(1)(D) of the ESAA, as interpreted by section 185.43(d) of the regulations, and Title VI of the Civil Rights Act of 1964.

As was explained in my earlier letter, both of these bases of ineligibility derive from

the facts and conclusions set out in the Appendix to the former Department of Health, Education and Welfare's letter of April 9, 1979, concerning the assignment of students to racially segregated and overcrowded schools.

I also am sorry to report that, although you have now provided to the Department all of the information required to establish the district's eligibility for ESAA funding, the information submitted in response to OCR's requests shows that the school district has not fully complied with the remedial plans developed in the areas of teacher assignment, classroom segregation and bilingual education. As a result, the various forms of racial and ethnic discrimination covered by those plans have not ceased to exist and continue to serve as bases of ineligibility for this year's ESAA funds.

Before addressing these additional matters, I want to explain why the legal and factual arguments in the Response and Supplement are not adequate grounds for revoking or modifying the two principal bases for my determination.

Assignment of Students to Racially Segregated and Overcrowded Schools

In the Response, the school district denies that it has unlawfully discriminated on the basis of race in assigning students to schools. The district contends that the Appendix to the letter of April 9, 1979, applies an erroneous legal standard for proving the segregative "purpose" or "intent" of Chicago school officials, makes a number of faulty assumptions, and contains assertions that are factually inaccurate and incomplete. The district claims, therefore, that it is not in

violation of Federal civil rights laws and that the plan submitted with its basic grant application -- Access to Excellence -- qualifies for ESAA funding as a "non-required" plan for the reduction of minority group isolation. Response, p. 1-3.

These contentions do not provide a sufficient basis upon which to withdraw or modify the conclusions in the Appendix. In the Response, for example, the district misconstrues the legal standard applied in the Appendix and misreads the Supreme Court's recent decisions in Columbus Board of Education v. Penick, 99 S.Ct. 2941 (1979), and Dayton Board of Education v. Brinkman, 99 S.Ct. 2971 (1979). Contrary to the claim in the Response, the Appendix does not rely exclusively -- in theory or in fact -- on the "natural, probable and foreseeable consequences" test for proving

the segregative "purpose" or "intent" of Chicago school officials.

The district's claims of improper use of school enrollment and capacity data also are unfounded. For example, the district criticizes the analysis in the Appendix for excluding mobile classroom units in determining a school's capacity. The Response states that this "predetermines the result concerning overcrowding" at schools with mobiles and "results in the deceptively large disparity in the Appendix's overcrowding statistics" for white and black schools. Response, p. 21. The Department's exclusion of mobiles in determining capacity, however, is consistent with the district's policies on the use of mobile classrooms. Board Report 72653-A, "Guidelines for the Use of Mobile Classrooms", December 9, 1964. See also Progress Report on Mobile Classroom Units,

May 8, 1963. Because these policies provide that mobiles are to be used as a temporary response to the problem of overcrowding, it is not unreasonable to consider a school with mobiles to be overcrowded and to exclude mobiles in determining a school's capacity. Moreover, the disparity in the Appendix's overcrowding statistics for white and black schools is not "deceptively large", but merely reflects the fact that disproportionate numbers of black students have been assigned to overcrowded schools, including schools with mobile classrooms.

Another critisicm [sic] of the Appendix's use of enrollment and capacity information is that references to the relative size of white and black schools are irrelevant to the issues of discrimination and overcrowding. Response, p. 19. This criticism, however, disregards

the district's own policy on the maximum, optimum size for elementary schools, which since 1962 has provided that an elementary school should not enroll more than 1,200 students. Statement to the Board of Education, October 10, 1962. More significantly, it ignores the segregative consequences of the district's actions affecting school size. The Appendix contains many examples where the district violated its optimum size policy by building additions and placing mobiles at large, overcrowded black schools. These examples further show that there often were smaller white schools in the area at which the district could have built an addition or placed mobiles, without violating the optimum size policy, to accommodate students from the overcrowded black schools. Instead of adopting these reasonable, less segregative alternatives,

however, the district repeatedly violated its optimum size policy and maintained racial segregation by taking actions to enlarge overcrowded and frequently oversized black schools.

In the Supplement, the district expands on the arguments put forward in the Response and addresses the specific examples of segregative conduct discussed in the Appendix. The incident-by-incident rebuttal in the Supplement, however, contains many serious deficiences. It relies on inaccurate and incomplete factual information, examines certain events in isolation from other relevant events, mischaracterizes the purpose and effects of particular actions, fails to respond to specific allegations in the Appendix, and draws conclusions that are not supported by the evidence. Thus, even though the Supplement points out a few factual errors

in the Appendix, it does not alter the Appendix's basic conclusions.

Several of the major deficiencies in the Supplement are illustrated in its analysis of the actions taken by the district at schools serving the Cabrini-Green housing project and surrounding area between the mid 1950's and early 1960's. Citing data on the race of families residing in the housing project from 1948 to 1965, the Supplement correctly states that the Appendix erred in claiming that Cabrini-Green was predominantly black from its inception. Supplement, p. 18-19. The Supplement uses this same data, however, to support the assertion that the Jenner School, located adjacent to the housing project, was integrated in 1954 and 1958 when sizeable additions were built at that school. Supplement, p. 19-20. This assertion is simply untrue.

Several witnesses -- including former employees of the district and persons active in school affairs -- have informed OCR that although Cabrini-Green did house white families in the 1950's, Jenner's enrollment was virtually all black as early as 1949. These witnesses explain that white children from the project attended parochial schools in the area, not Jenner, during this period. Thus, because the Supplement draws erroneous conclusions from housing data, it fails to disprove the essential facts in the Appendix -- that Jenner was a black school throughout the 1950's when Chicago school officials were planning and constructing the two large additions at that school.

The Supplement s [sic] analyses of other actions in this area are similarly misleading and incomplete. The Supplement states, for example, that the two boundary

changes between the Ogden and Franklin schools in 1961 and 1962 "had the effect of substantially integrating Ogden." Supplement, p. 21, 66. To support this proposition, the Supplement compares 1963-64 and 1964-65 racial data on the enrollment at Ogden. Supplement, p. 66. Obviously, however, this comparison is inapposite because the two boundary changes became effective in 1961-62 and 1962-63, respectively. Board Report 69011-H, April 12, 1961; Board Report 70933-A, December 26, 1962. Moreover, since Ogden's enrollment was only 4.1% black in 1963-64, the boundary changes could not have had a significant integrative effect at Ogden. And the Supplement does not deny that the boundary changes also had segregative effects at predominantly black Franklin, which lost most of its white students to

Ogden as a result of the boundary adjustments.

Another example from this area is the opening of LaSalle School in 1961. The Supplement claims that the new facility simply replaced the old LaSalle School on the same site and that the school opened with an integrated enrollment. Supplement, p. 21. This explanation, however, ignores alternative sites that were available to the district, including several sites that were actually proposed by local community groups. Furthermore, LaSalle was not "integrated" when it opened. In 1963-64, LaSalle's enrollment was only 4.5% black. Although the school also enrolled 26.9% other minority students in that year, the enrollment of these students did not make LaSalle an "integrated" school. Rather, it merely shows that the district did not segregate white and other minority students

to the same extent that it segregated white and black students. This fact is born out by other actions discussed in the Appendix. E.g., Appendix, p. 60-62.

The Supplement's discussion of new school construction along Ashland Avenue between 1970 and 1974 again illustrates several notable deficiencies. The Supplement states that seven new schools were opened during this period "to accommodate the sudden and substantial increases" in black student population caused by "drastic demographic changes" in the area. Supplement, p. 25-33. The Supplement explains that, as a result of these demographic changes, "[w]hen a new school was planned its attendance area would be integrated, but by the time the school was opened the neighborhood had become predominantly black." Supplement, p. 29. In addition, the Supplement claims

that "[e]mphasis was necessarily placed on accommodating students within their attendance areas, since adjacent areas were either already overcrowded or about to become so." Supplement, p. 31.

This analysis is inadequate because it fails to respond to several specific allegations in the Appendix. Even if the Department accepted the contention, which it does not, that the district's site selection practices did not contribute to the creation of segregated student bodies at these seven schools, the district still has not explained why these schools also were assigned identifiably black faculties and black administrators. The district also has not explained the highly improbable coincidence that only these schools and other black schools opened with the names of famous black Americans. Appendix, p. 20-21.

The Supplement's failure to address these issues is significant. It has been recognized in several Supreme Court decisions that a school can be identified as a "white" or a "black" school by referring to factors other than just the racial composition of its enrollment. E.g., Keyes v. School District No. 1, 413 U.S. 189, 202 (1973); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 19 (1971); Green v. County School Board of New Kent County, 391 U.S. 430, 435 (1968). Moreover, evidence relating to the assignment of faculty and administrators is highly probative of the segregative intent of school officials. E.g., Dayton Board of Education v. Brinkman, supra, 99 S.Ct. at 2978-79; Keyes v. Scholl District No. 1, supra, 413 U.S. at 209-10; Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 18; Green v. County

School Board of New Kent County, supra, 391 U.S. at 435; Morgan v. Kerrigan, 509 F. 2d 580, 595 (1st Cir. 1974), cert. denied,, 421 U.S. 963 (1975).

Another deficiency in the Supplement's explanation of the new construction along Ashland Avenue is that it is based on two questionable propositions. The first is that the district simply was overwhelmed by events and was unable to influence the racial composition of schools in the area. This proposition belies the district's knowledge of demographic patterns and projections for this area and its ability to plan for such developments. The second proposition is that there was no direction in which the district could have moved to build new schools. This proposition completely disregards the traditionally white areas to the west. In short, the Supplement has not demonstrated the

validity of the two basic propositions underlying its explanation.

Like the contentions in the Supplement already discussed, the district's assertions on the placement of mobile classroom units also are based on inaccurate, incomplete and often misleading factual information. Specifically, the district denies that a disproportionate number of mobiles were ever placed at identifiably black schools. The Supplement states that "the Board assigned mobiles wherever they were needed, regardless of the racial composition of the school that received them" and that "numerous mobiles were assigned to integrated or predominantly white schools, as well as to predominantly black schools." Supplement, p. 39.

To support these assertions, the district compares the racial compositions

of schools that received mobiles in 1963-64, 1966-67 and 1972-73. Supplement, p. 39. This comparison, however, focuses on the number of schools receiving mobiles and ignores the fact that significantly more mobiles were assigned to identifiably black schools than were assigned to integrated or predominantly white schools. For example, an analysis of the placement of mobiles at 90-100% black and 90-100% white schools in 1966-67 shows that the black schools with mobiles had an average of 6.7 mobiles per school, while the white schools with mobiles had an average of only 3.2 mobiles per school. This analysis also shows that 64.4% of all mobiles assigned in 1966-67 were assigned to 90-100% black schools, while only 22.6% of the mobiles were assigned to 90-100% white schools. An analysis of prior and subsequent years' data also reveals similar assignment

patterns. Thus, while the Supplement does show that mobiles were placed at integrated and predominantly white schools, it fails to refute the allegation in the Appendix that the district assigned a disproportionate number of mobile classrooms to identifiably black schools.

The district also defends its use of temporary classrooms by stating that mobile units were assigned to preserve and stabilize integration at particular schools. Supplement, p. 41-44. The evidence cited to support this contention, however, has little probative value. The Supplement states, for example, that Board Report 2, dated February 24, 1965, "shows the placement of mobile units to reduce class size to 32.5 or less pupils at 51 racially integrated schools." Supplement, p. 42. In fact, however, this report does not show that mobiles actually were

assigned to any of the 51 schools. It merely shows that 20 of the 51 schools listed in the report needed mobiles to meet the prescribed class size. Moreover, eight of the 20 schools needing mobiles had enrollments that were in excess of 75% white or 75% black, and the remaining 12 schools needed a total of only 23 mobiles.

The other evidence cited in the Supplement to support this contention--namely, the examples in which mobiles allegedly were placed at particular schools to promote integration -- are similarly unpersuasive. The Supplement claims, for example, that mobiles were assigned to the Vanderpoel and Barnard schools in the early 1970's "to foster integration" and "to accommodate an increasingly integrated enrollment." Supplement, p. 42, 44. However, the Supplement's discussion of these actions is incomplete because it

ignores numerous other segregative actions that the district took at these and other schools in the area.

For example, the district opened the W.E. Green School in 1972 just to the northeast of Barnard and east of Vanderpoel. Green opened with a 71% black faculty and a virtually all-black enrollment. It also enrolled at least 260 black students who had attended Vanderpoel and Barnard in 1971. By locating Green so that it took in areas from the east and northeast portions of the Vanderpoel and Barnard attendance zones, the district guaranteed that Green's enrollment would be all-black. Moreover, there were other possible locations for Green to the west. These alternative sites would have integrated Green and would have avoided the reassignment of at least 260 black students

from two integrated schools to an all-black school.

During an earlier period, the district also took other segregative actions at the schools in this area, including the maintenance of Barnard and Bates as separate white and black schools. These schools shared a common attendance boundary and were located less than one mile apart. Bates was a K-6 school on a small site, and it had sent its seventh and eighth grade students to the all-black Shoop School for many years. Shoop, however, had eight mobiles as early as 1965, several years before Barnard, also a K-8 school, received its first mobile classroom. If the district had assigned Bates' seventh and eight grade students to Barnard rather than to Shoop, the district could have integrated Barnard long before the early

1970's. Instead, the district maintained Barnard as an all-white school.

The Supplement concludes its analysis of the allegations regarding mobile classrooms by attempting to refute the specific examples discussed in the Appendix. Once again, however, the Supplement's explanations are inadequate.

For example, the Supplement acknowledges that 16 mobile units were placed at the Altgeld School in 1964 and 1965 as its enrollment became severely overcrowded and overwhelmingly black. Supplement, p. 47. The Supplement attempts to show, however, that the less segregative alternatives proposed in the Appendix were not reasonable means of relieving the overcrowding at Altgeld. Specifically, the Supplement states that the Raster and O'Toole schools were overcrowded, not underutilized, and that Barton was not

nearby but was located one and one-half miles away. Supplement, p. 47. Moreover, the Supplement claims that boundary changes between the Barton and Cook schools in 1965 and 1968 utilized the excess capacity and integrated the student body at Barton. Supplement, p. 47.

This response is inadequate because it dismisses without explanation the Appendix's suggestion that some mobiles be placed at Raster and O'Toole to accommodate students from Altgeld. Appendix, p. 30. In 1965, these schools were virtually all-white and had no mobiles, although they were located on sites of sufficient size to accommodate mobiles. Thus, the placement of mobiles at these schools could have relieved overcrowding at Altgeld and integrated both Raster and O'Toole. Furthermore, by simply categorizing Raster and O'Toole as "overcrowded", the

Supplement totally disregards the significant differences that existed in the size and degree of overcrowding at Altgeld and the two white schools. The Appendix's suggestion also would have eliminated these differences by distributing the burden of overcrowding more equitably among these schools.

The Supplement's explanation also fails because it does not adequately explain why the district did not reassign students to or place mobiles at Barton to relieve the overcrowding at Altgeld. In all probability, any problems arising from the distance between Altgeld and Barton could have been solved through attendance area adjustments. Moreover, the Cook-Barton boundary changes tend to confirm, rather than refute, the allegations in the Appendix.

Given the speed with which demographic changes were occurring in this area of the city, the boundary change between Cook and Barton in 1968 is too remote in time to explain or justify the district's failure to use Barton to relieve Altgeld's overcrowding in 1965. The 1965 boundary change, on the other hand, is highly relevant. Contrary to the statements in the Supplement, however, this boundary change had significant segregative effects at both Cook and Barton. As the following table shows, the 1965 boundary change transferred mostly white students from racially changing Cook (96.9% white in 1963) to identifiably white Barton (100.0% white in 1963):

| | | Cook | |
|---|---|---|---|
| | Enrollment | White | Black |
| 1965 | 750 | 66.0% | 34.0% |
| 1966 | 1010 | 24.4% | 75.6% |

Barton

| Enrollment | White | Black |
|---|---|---|
| 399 | 95.2% | 4.0% |
| 500 | 88.0% | 11.8% |

Thus, the 1965 boundary change between Cook and Barton actually promoted the segregation of white and black students in schools along Ashland Avenue. For this reason, it does not justify the district's decision to place 16 mobiles at identifiably black Altgeld, rather than reassign some Altgeld students to identifiably white and underutilized Barton.

The district's actions in creating and altering attendance boundaries, feeder patterns and optional zones is another area in which the Supplement fails to rebut the basic findings set forth in the Appendix.

As was explained previously, the Supplement s [sic] analysis of the two Ogden-Franklin boundary changes was based on erroneous and incomplete factual information. Similarly, the Supplement totally mischaracterizes the effects of the 1965 boundary change between Cook and Barton. These and other deficiences [sic] also can be found in the justifications given for the other actions affecting school boundaries discussed in the Appendix.

For example, the Supplement does not dispute the basic facts in the Appendix regarding the adjustments in attendance areas, grade structures and feeder patterns of eight elementary schools prior to the opening of two new schools -- Orr Middle (later renamed Piccolo Middle) and Laura Ward -- in 1973. Specifically, the district changed the grade structures of four schools with negligible black

enrollments north of Chicago Avenue and designated those schools as feeder schools for Piccolo Middle. At the same time, in anticipation of the opening of Laura Ward, the district adjusted the attendance areas, grade structures and feeder patterns of four virtually all-black schools immediately south of Chicago Avenue. The effect of these changes was to create two sets of racially identifiable schools with contiguous attendance areas. Black students attended schools south of Chicago Avenue, while white students attended schools north of Chicago Avenue. Appendix, p. 60-62.

In addition, despite the numerous changes made by the district, two black schools south of Chicago Avenue remained overcrowded, requiring ten and twelve mobiles to accommodate their students. None of the schools north of Chicago

Avenue, on the other hand, required mobiles. In fact, several of these schools reported the availability of surplus classrooms in 1973.

The Supplement attempts to justify the district's actions by arguing that (1) since Piccolo Middle served students in grades 6-8 and Laura Ward served students in grades K-8, "any complete restructuring of attendance areas was not feasible, as the two schools were not intended to enroll students in comparable grade levels" (Supplement, p. 97); (2) the actions resulted "in the maximum amount of integration that was possible in this geographic area" (Supplement, p. 97); and (3) the less segregative alternative proposed in the Appendix was not feasible because it would have resulted in overcrowding at Piccolo Middle in 1975. (Supplement, p. 99). These arguments,

however, do not refute the allegations in the Appendix.

The Supplement's first argument fails because it completely ignores the substantial grade restructuring and boundary adjustments that occurred at the eight schools affected by the new school openings, including the restructuring of grades at several of the black schools south of Chicago Avenue. The Supplement provides no explanation why alternative boundaries and grade structures would have been any more extensive or burdensome then [sic] those actually adopted in 1973.

The Supplement's second argument is simply untrue. To show that the actions taken resulted in "the maximum amount of integration that was possible", the Supplement points out that several of the schools north of Chicago Avenue had substantial Hispanic enrollments.

Supplement, p. 97-98. However, for the reasons stated earlier in connection with the opening of LaSalle School, this fact does not explain the almost complete segregation of white and black students in schools immediately north and south of Chicago Avenue. Moreover, in making this argument, the Supplement completely disregards the less segregative alternative proposed in the Appendix. Appendix, p. 62.

The Supplement's third argument attacks the alternative proposed in the Appendix because it would have caused Piccolo Middle to become overcrowded by 1975. The Supplement cites no evidence, however, to support the suggestion that prior to the opening of the two new schools in 1973, Chicago school officials anticipated the potential for overcrowding at Piccolo Middle in 1975. More significantly, this argument ignores the

fact that several of the black schools south of Chicago Avenue already were overcrowded in 1973. Thus, it fails to show that the alternative actions proposed in the Appendix were not feasible means of reducing the racial segregation and overcrowding that existed in the schools serving this area in 1973.

In responding to other allegations in the Appendix regarding the creation and alteration of optional zones and feeder patterns, the Supplement asserts that the actions taken by the district were legitimate efforts to stabilize integration at schools with declining white enrollments. Supplement, p. 80-90. The Supplement argues, in essence, that the district was justified in allowing white students to attend schools with substantial but declining white enrollments, rather than the predominantly black schools to

which the students otherwise would have been assigned, because the actions were necessary to stem the decline in white enrollment at such schools.* The theory underlying this argument is that white students are less likely to flee schools with black students if the white students are grouped in sufficiently large numbers at the school.

There are two principal reasons why this argument fails to justify the actions taken by the district. First, the argument ignores the segregative effects of the actions at the schools to which the white students otherwise would have been assigned. In many instances, these schools

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* The Supplement attempts to justify other segregative actions discussed in the Appendix on the basis of this same argument. Supplement, p. 36, 50-51, 77. For the reasons subsequently discussed, however, the argument also fails to justify those actions.

became virtually all-black following the district's action. Second, the evidence on optional zones and feeder patterns cannot be viewed in isolation from the other evidence of intentionally segregative actions discussed in the Appendix. This evidence shows that the district took numerous other segregative actions at the same schools or at other schools in the same areas of the city as those discussed in the Appendix; that these other segregative actions were roughly contemporaneous with those actions; and that the other actions also were taken to satisfy white community desires. Thus, when the district's actions in creating and altering optional zones and feeder patterns are viewed in conjunction with all of the other evidence, it is quite clear that the actions form a pattern of segregative activity.

These same two factors also distinguish Johnson v. Board of Education of the City of Chicago, 604 F.2d 504 (7th Cir. 1979), which the district cites in support of its position. In Johnson, the Court of Appeals upheld the constitutionality of the racially controlled admissions programs at Gage Park and Morgan Park high schools as lawful efforts to prevent de facto segregation. The programs at Gage Park and Morgan Park, however, specifically provided that excluded black students may attend white or other integrated schools, with bus transportation provided by the district. Thus, unlike its actions affecting optional zones and feeder patterns, the district took positive steps in implementing the Gage Park and Morgan Park plans to ensure that they did not increase racial segregation at other schools. Moreover, the issue before the Court in Johnson was a

narrow one - - whether the admissions programs in effect at two high schools were unlawful. The conclusions in the Appendix, on the other hand, are based on an examination and analysis of school officials' actions dating back over the past several decades and affecting schools throughout the system. The importance of this distinction has been recognized by the courts in numerous school desegregation cases, particulary with respect to proving segregative "intent":

> Although it might not be possible to infer the requisite discriminatory intent from any one instance in the record, it is clear that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents. United States v. Board of Commissioners, Indianapolis, 474 F.2d 81, 84 (7th Cir. 1973), cert. denied, 413 U.S. 920 (1974); accord, Morgan v. Kerrigan, supra, 509 F.2d at 582; Davis v. School District of the City of Pontiac, 443 F.2d 573, 575-76 (6th Cir. 1971).

Thus, the Supplement again fails to refute the allegations in the Appendix.

The Supplement also challenges the Appendix's analyses of the various programs proposed by the district to relieve overcrowding through the reassignment and transportation of students. The explanations given in the Supplement, however, suffer from many of the same deficiencies previously discussed in connection with the other examples from the Appendix.

For example, the Supplement does not dispute the fact that a lack of support from the affected communities, including the white community, caused the district not to adopt the "Intra-Community Pilot Program" for the South Shore area in 1967. Supplement, p. 139. Under this program, students from three overcrowded black schools --Bryn Mawr, Mann and Caldwell--

were to transfer to nine underutilized white schools. This program was proposed both to relieve overcrowding at the black sending schools and to promote stable integration at the white receiving schools. Board Report 68-17-2, January 10, 1968; Board Report 67-1271-6, December 27, 1967.

The Supplement defends the district's rejection of this proposal by stating that the district adopted "an alternative plan which resulted in the opening of two new schools -- the Black School and Black Annex -- with racially stable enrollments." Supplement, p. 139. The Supplement also points out that these "mini-magnet" schools have remained stably integrated since their opening in 1968. Supplement, p. 85-86, 139.

The defense put forward in the Supplement is inadequate for two reasons. First, as originally proposed by the

Superintendent, the "Intra-Community Pilot Program" and the creation of magnet schools were separate, complementary programs. Contrary to the suggestion in the Supplement, they were not alternative or substitute proposals. Increasing Desegregation of Faculties, Students, and Vocational Education Programs, Section B, August 23, 1967. Second, and more significantly, the Supplement fails to recognize important differences in the two programs, particularly in their effects on the related problems of overcrowding and racial segregation.

Under the "Intra-Community Pilot Program", a total of 462 students would have transferred from the three overcrowded black schools to the nine underutilized white schools. Board Report 68-17-2, January 10, 1968. This program would have had a substantial impact on the overcrowded

conditions at the black sending schools and would have improved integration at all nine white receiving schools. By contrast, the establishment of Black and Black Annex created two new integrated schools, but had little effect on the overcrowding at black schools or the segregation at white schools in the South Shore area. Only about 200 black students were authorized to attend Black and Black Annex because of the 50% white-50% black admissions goal established for those schools. In addition, these 200 black students were drawn from the 20 schools that were authorized to send students to Black and Black Annex, not just from schools with serious overcrowding problems. Board Report 68-569, July 10, 1968. As a result, the three black schools proposed as sending schools under the "Intra-Community Pilot Program" remained seriously overcrowded, requiring a total of

16 mobile units to accommodate their students in 1968-69. Moreover, as the following table shows, most of the white schools proposed as receiving schools remained highly segregated in 1968-69:

Racial Composition of
Proposed Receiving Schools (1968-69)

| | Black | White |
|---|---|---|
| Anthony | 1.1% | 88.9% |
| Buckingham | 4.0 | 86.9 |
| Burnham | 6.7 | 88.3 |
| Coles | 25.5 | 62.9 |
| Goldsmith | 1.3 | 81.8 |
| Hoyne | 17.3 | 78.7 |
| Luella | 9.8 | 85.1 |
| Sullivan | 2.6 | 29.6* |
| Warren | 15.1 | 72.5 |

In summary, the establishment of Black and Black Annex was not an alternative or substitute for the Superintendent's proposed "Intra-Community Pilot Program." While these schools did provide an integrated education for some students,

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* Sullivan enrolled 67.8% other minority students in 1968-69.

they did not significantly reduce the overcrowding at black schools or contribute to the integration of white schools in the South Shore area. Thus, the Supplement does not refute the basic allegations in the Appendix.

Similarly, the Supplement fails to justify the various limitations and restrictions imposed on the district's busing program for the Austin area in administrative district 4. Identical in all fundamental respects to the South Shore proposal, this program was proposed in 1967 to relieve overcrowding and to stabilize integration by transporting students from two overcrowded black schools -- May and Spencer -- to eight underutilized white schools. Board Report 67-1271-6, December 27, 1967; Board Report 68-17-2, January 10, 1968. Following pressure from community groups, however, the district adopted

several limitations that severely reduced the program's potential for relieving overcrowding and promoting desegregation. These limitations included the imposition of a 15% ceiling on the number of transfer students that a receiving school was required to accept, regardless of the school's capacity; the prohibition of white student transfers; the refusal to reassign some special education students from Nash and Young to other schools with sufficient capacity in administrative district 4; and the authorization of parents to refuse their child's transfer under the program. Board Report 68-17-2, January 10, 1968; Board Report 68-213, March 4, 1968.

The Supplement gives no justification whatsoever for several of these limitations, including the 15% ceiling on the number of transfer students in a

receiving school. Moreover, the justifications given for the other restrictions are simply inadequate. For example, the Supplement states that the Nash and Young schools, both virtually all-white, were not included in the program because they had no excess capacity due to the location of 22 special education classrooms at those schools. Supplement, p. 136-137. The Supplement explains further that the alternative of transferring these classrooms to other underutilized schools in administrative district 4 was unavailable because the Department's own regulations issued under section 504 of the Rehabilitation Act of 1973 recognize the detrimental effects of transporting special education students further than necessary and prohibit such transfers. Supplement, p. 118-119, 137. See 45 CFR 84.34.

This explanation is inadequate because it suggests that the transfer of these special education classrooms to other schools in administrative district 4 would have imposed a greater burden or hardship on these students. The Supplement presents absolutely no evidence to support this proposition. Moreover, as early as 1966, several white schools in administrative district 4 -- Burbank, Sayre and Smyser-- had more than enough capacity to provide all the necessary special education classrooms. In all probability, since these three schools had no special education classrooms of their own, and since Nash and Young contained most of the special education classes in administrative district 4, some of the students who were enrolled in Nash and Young in 1966 resided in the Burbank, Sayre and Smyser attendance areas. Clearly, for these students, the

proposed transfer of special classrooms would not have increased the burden of their transportation.

The Supplement also attacks the suggestion in the Appendix that the district could have contributed substantially to racial stability in the Austin area by implementing at an earlier date a program like the Austin busing program. The Supplement contends that if the district had implemented such a program in 1965, it would not have resulted in desegregation because most of the students in May and Spencer were white at that time. The Supplement also claims that "overcrowding at May and Spencer did not become severe until 1967, at which time the Austin plan was implemented." Supplement, p. 137.

This explanation again misrepresents the basic facts. The Austin busing program was

initiated on March 11, 1968, but was not fully implemented until the 1969-70 school year. Supplement, p. 136. Moreover, as the following table shows, May and Spencer already were predominantly black and seriously overcrowded in 1966, long before the program was fully implemented:

| | May | | | |
|---|---|---|---|---|
| | Enrollment | Black | White | Mobiles |
| 1965 | 853 | 30.4 | 67.4 | 0 |
| 1966 | 1035 | 57.7 | 35.6 | 5 |
| 1967 | 1559 | 88.9 | 13.0 | 0* |
| 1968 | 1586 | 95.9 | 2.5 | 0 |
| 1969 | 2080 | 98.9 | 1.0 | 5 |

* The district opened an addition at May in 1967.

Spencer

| Enrollment | | Black | White | Mobiles |
|---|---|---|---|---|
| 1965 | 1022 | 10.1 | 85.1 | 2 |
| 1966 | 1304 | 53.2 | 45.4 | 9 |
| 1967 | 1325 | 82.3 | 11.9 | 12 |
| 1968 | 1624 | 90.8 | 4.6 | 12 |
| 1969 | 2078 | 97.1 | 1.0 | 14 |

Thus, the Supplement does not refute the basic allegation in the Appendix -- that the implementation of such a program at an earlier date would have contributed to the racial stability of the Austin area by spreading the burdens of overcrowding and desegregation more equitably among all the schools in the area.

The Supplement also fails to rebut the essential facts regarding the segregative busing programs discussed in the Appendix. For example, the Supplement defends the busing of black students from Brenan to Poe in 1973 and 1974 on the theory that "the use of the vacant Poe building was the only available solution to the problem of

overcrowding at Brenan." Supplement, p. 141. The Supplement specifically rejects the less segregative alternatives proposed in the Appendix because "[n]one of the alternative schools . . . had sufficient available capacity to accommodate the seventh and eighth grade students from Brenan." Supplement, p. 141. In addition, the Supplement claims that the Clissold Schools "was much farther from Brenan than Poe was", and that the Nansen and White schools were too unstable racially to receive black students from Brennan. Supplement, p. 141.

The Supplement's defense of the Brenan-Poe busing program fails to demonstrate that Poe was "the only available solution" to relieve the overcrowding at Brenan. Even assuming that Nansen and White were not reasonable alternatives, the Appendix suggests four other white schools--

Clissold, Sheldon, Sutherland and Cassell -- that could have accommodated all of the black students from Brenan. According to the data provided in the Supplement, these four schools had sufficient permanent capacity to accommodate over 260 additional students in both 1973 and 1974. Furthermore, even though Poe had three mobiles in 1973 and seven mobiles in 1974, the Supplement ignores the possibility of placing mobiles at the four white schools to accommodate even more students from Brenan. Three of the four white schools had no mobiles in 1973, and only one of the schools had as many as four mobiles in 1974. Thus, these four white schools could have accommodated all of the students, 423 in 1973 and 506 in 1974, who were bused from Brenan to Poe under this program.

Additionally, Clissold was not "much farther from Brenan than Poe was."

Supplement, p. 141. On the contrary, Clissold and Poe were roughly equidistant from Brenan. Moreover, any minor differences in the distances or travel times between these schools are irrelevant since the district provided transportation to the students transferring under the program.

The Supplement's justification for the Raster-Dyett busing program also is unpersuasive. The Supplement states that the district began busing students from Raster to Dyett in January 1975 in order to alleviate overcrowding at Raster. The Supplement explains further that the Dyett School was selected to receive students from Raster because it was the closest school that had sufficient capacity and was operating under the district's 45-15 Plan. The Supplement also dismisses the six underutilized white schools proposed as

alternatives to Dyett in the Appendix, "since they all operated a nine-month regular school year program not conducive to the 45-15 Plan." Supplement, p. 146.

In short, the Supplement bases its defense on the 45-15 Plan, another program to alleviate the district's overcrowding problems. The plan was first implemented as a pilot program in 1971. Board Report 71-528-6, June 3, 1971. Under this plan, students attended school for a 45-day period and then had a 15-day vacation before starting another 45-day period. This served to relieve overcrowding since only three-quarters of a school's enrollment were in attendance on a given day. Board Report 71-287-7, March 24, 1971.

The Supplement argues, in essence, that the busing of students from Raster to Dyett to relieve overcrowding was justified

because the students needed to continue under the 45-15 Plan. The Supplement gives no explanation, however, why students from overcrowded Raster needed to continue under the 45-15 Plan, particularly since that program also was designed to alleviate overcrowding. It may be that the first students transferring from Raster in January 1975 needed to attend Dyett in order to avoid disruption of their education at mid-year. By the beginning of the 1975-76 school year, however, the need to avoid mid-year disruption no longer existed. Thus, the Supplement fails to provide an adequate justification for continuing the Raster-Dyett busing program for 1975-76 through 1978-79.

The final section in the Supplement responds to the Appendix's allegations regarding the assignment of faculty and administrators to schools on the basis of

race. The Supplement makes no effort to explain or rebut the specific facts and conclusions set forth in the Appendix. Instead, the Supplement merely states that these allegations are irrelevant because the district's application for a waiver of ineligibility for FY 1979 ESAA funds was adequate with respect to the reassignment of faculty. Supplement, p. 147-148.

This answer is not responsive to the allegations. As was explained in the Appendix, even though the district has made considerable progress toward faculty desegregation, evidence of past racial discrimination in the assignment of faculty and administrators is relevant to the issue of unlawful student segregation. Federal courts consider school policies and practices for assigning faculty and staff to be an important indicator of an unlawfully segregated school system and

highly probative of the segregative intent of school officials in the system as a whole. Appendix, p. 96, 98, 101-102. Thus the Supplement's response again fails to explain or justify the actions discussed in the Appendix.

As the preceding analysis demonstrates, the Response and Supplement submitted at the show cause meeting do not refute the essential facts and conclusions set forth in the Appendix. I am in complete agreement, therefore, with the conclusion reached by the Department of Justice based on its review of the two documents. On page 4 of his recent letter to you, dated April 21, 1980, Assistant Attorney General Days wrote:

> While the response sheds new light on several areas of factual dispute, it fails to dispel our general conclusion, which is based on both HEW's study and our own, that the Board has intentionally segregated students throughout a substantial

> portion of the school system. Thus, we believe that a systemwide remedy is required.

Thus, I have no alternative but to sustain the two principal bases for the determination of ineligibility in my letter of February 28, 1980.

Because I have not revoked the first basis of ineligibility cited in my earlier letter, the district's basic grant application for FY 1980 may not be considered for funding. The district has not shown that Access to Excellence is one of the alternative types of plans for which ESAA basic grant funds may be awarded, and a determination of plan ineligibility under section 606(a) of the Act is not subject to the waiver of ineligibility provisions set out in section 606(c). 20 U.S.C. 3196(a), (c).

I also understand, however, that representatives of the district and the

Department of Justice have begun negotiations on this matter under Title IV and Title VI of the Civil Rights Act of 1964. If these negotiations are successful in developing a legally sufficient school desegregation plan, this plan may be submitted in an application for a waiver of ineligibility in accordance with the procedures discussed in my earlier letter. By obtaining a waiver of ineligibility on this issue, as well as on the other bases of ineligibility discussed in this letter the district may become eligible for an ESAA magnet grant, which does not require a qualifying plan, or for other types of ESAA assistance in the future. Thus, I urge you to resolve this student assignment matter voluntarily through the negotiations with the Department of Justice.

Other Bases of Ineligibility

1. Teacher Assignment

Section 185.45(b)(2) of the ESAA regulations provides:

> No education agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.

On October 12, 1977, OCR and the district entered into an agreement to remedy the violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., found by Administrative Law Judge (ALJ) Everett Hammarstrom on February 15, 1977, in the areas of faculty assignment

and bilingual education. The agreement is entitled Plan for the Implementation of the Provisions of Title VI of the Civil Rights Act of 1964 Relating to Integration of Faculties, Assignment Patterns of Principals, and Bilingual Education Programs (Plan).

To remedy the ALJ's findings with respect to the assignment of teachers, the Plan prescribes two compliance or remedial standards, one applicable for September 1977 and one applicable after the September 1977 standard has been reached. These standards establish goals for the racial/ethnic composition, the experience and the training of teaching staffs at each school in the system. Specifically, the compliance standard for September 1977 provides (Plan, p. 11):

1. The racial/ethnic composition in each school will be

   . no more than 65 percent nonminority and no less than 40 percent nonminority

   or

   . no more than 60 percent minority and no less than 35 percent minority

2. The percentage of experienced teachers in each school will be between plus or minus 12 percent of the systemwide percentage of experienced teachers for each school type.

3. The range of educational training of each faculty will be substantially the same as exists in the system as a whole.

The compliance standard applicable once the standard for September 1977 has been met is contained in the following provision (Plan, p. 11):

> In implementing this Plan, the Chicago Public School District will make every good faith effort to follow professional staff assignment and transfer practices which, when taken together as a whole on a frequently reviewed periodic basis, will assure that the racial composition, the experience and the educational background of individual school faculties and administrative staff more nearly approach* the city-wide proportions of minority, experienced, and more extensively trained professional staff provided however that nothing in this Plan shall require the assignment or transfer of any person to a position for which he or she is not professionally qualified. The Chicago Public School District will not adopt or follow assignment and transfer practices which will foreseeably result in the racial identifiability of schools based on faculty or administrative staff composition or in unequal distribution of experienced and more extensively trained staff.
>
> *Plus or minus ten percentage points of city-wide averages for race, experience, and training for each type of school facility.

During FY 1978 and FY 1979, the district was found ineligible for ESAA funds under 45 CFR 185.43(b)(2) based on the ALJ's findings of noncompliance with Title VI and the district's failure to meet the prescribed racial/ethnic goals for September 1977 at a substantial number of schools. In FY 1979, after negotiating with OCR several modifications in the Plan, the district submitted information with its application for a waiver of ineligibility showing that, as of June 13, 1979, the racial/ethnic composition of each school's faculty fell within the compliance range prescribed for September 1977. Thus, on September 15, 1979, the district was notified that its waiver application was adequate with respect to the assignment of teachers.

In connection with its applications for FY 1980 ESAA funding, the district now

has submitted to OCR information on the racial/ethnic composition of each school's faculty as of October 31, 1979, and April 28, 1980. In addition, the district has provided information on the experience and training levels of each school's teaching staff as of April 28, 1980. This information was specifically requested by OCR in order to monitor the district's continued compliance with the Plan and to ensure that the recent reduction in and reassignment of teaching staff caused by the district's budgetary problems did not adversely affect its faculty desegregation efforts.

An analysis of this information shows that since June 13, 1979, the district's assignment of teachers to schools has caused a substantial number of schools to fall out of compliance with the racial/ethnic remedial standards prescribed in the

Plan. The information also shows that between October 1979 and April 1980, there was a significant increase in the number of schools that do not meet these compliance standards, presumably as a result of the faculty reassignments necessitated by the district's financial difficulties. And finally, the information shows that many schools fall outside the compliance ranges for experience and training in the Plan.

More specifically, according to the "Racial/Ethnic Survey-Staff" conducted on October 31, 1979, the faculties at 106 schools, including 79 regular schools and 27 special schools, did not meet the 35-60 percent minority standard prescribed in the Plan for September 1977. Moreover, 35 of the 79 regular schools and 17 of the 27 special schools required the reassignment of two or more teachers in order to reach the standard. In fact, several schools--

including Taft and Bogan high schools and four special schools -- were out of compliance by ten or more teachers.

Based on this same data, an even greater number of schools failed to meet the Plan's "more nearly approach" standard (i.e., plus or minus ten percentage points of the system-wide average for each facility type). Specifically, the racial/ethnic composition of the faculties at 183 schools -- 141 regular schools and 42 special schools -- fell outside this compliance range. This included 38 regular schools and 30 special schools that deviated by more than 15 percentage points from the system-wide average for each facility type.

An analysis of the staff racial/ethnic survey conducted on April 28, 1980, shows even more schools outside the racial/ethnic compliance ranges prescribed in the Plan.

According to this survey, 172 schools failed to meet the 35-60 minority standard prescribed in the Plan, including 142 regular schools and 15 special schools that required the assignment of two or more teachers in order to achieve compliance with the standard. Moreover, there were two additional schools -- Hope Middle School and Bell Special Education School-- that were out of compliance by ten or more teachers.

Once again, a larger number of schools also fell outside the "more nearly approach" standard in the Plan. Based on the April 1980 survey, the racial/ethnic composition of the faculties at 200 regular schools and 41 special schools did not comply with this standard, including 67 regular schools and 37 special schools that deviated by more than 15 percentage points

from the system-wide average for each facility type.

The survey conducted on April 28, 1980, also shows that the district has not complied with Plan's requirements regarding the experience and training levels of individual schools' teaching staffs. Specifically, the survey shows that the percentage of experienced teachers at 52 regular schools and 35 special schools deviated by more than 12 percentage points from the system-wide percentage of experienced teachers for each facility type. In addition, 151 regular schools and 31 special schools have faculties with educational backgrounds that were not "substantially the same" as exists in the system as a whole (i.e., deviated by more than 12 percentage points from the system-wide percentage of teachers with B.A. degrees).

In short, the district has not complied fully with the faculty desegregation requirements in the Plan. Although the district did demonstrate compliance with the 35-60 percent minority standard for September 1977 in its application for a waiver of ineligibility for FY 1979 ESAA funds, the information subsequently provided shows that the district has not continued to assign teachers so that the racial/ethnic composition of each school's faculty "more nearly approaches" the system-wide average for each facility type. In fact, many schools are no longer in compliance with the 35-60 percent minority standard. Moreover, the information shows a significant number of schools do not meet the compliance ranges for experience and training in the Plan.

Because the district has not complied with the Plan, it has not completely eliminated the racial discrimination in the assignment of faculty found by the ALJ. Thus, the district is ineligible for ESAA funding under section 606(c)(1)(B) of the Act, as interpreted by section 185.43(b)(2) of the regulations, based on its continued failure to comply with Title VI of the Civil Rights Act of 1964.

2. Classroom Segregation

Section 185.43(c) of the ESAA regulations provides:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any procedure for the assignment of children to or within classes which results in any segregation of minority group from nonminority group children for more than 25 percent of the school day classroom periods, in conjunction with desegregation or the conduct of any activity described in Section 706 of the Act. This paragraph shall not be construed to prohibit bona fide

ability grouping as a standard pedagogical practice. Such grouping is that which is:

(1) Based upon nondiscriminatory, objective standards of measurement which are educationally relevant to the purposes of such grouping and which, in the case of national origin minority group children, do not essentially measure English language skills;

(2) Determined by the nondiscriminatory application of the standards described in subparagraph (1) of this paragraph, and maintained for only such portion of the school day classroom periods as is necessary to achieve the purposes of such grouping;

(3) Designed to meet the special needs of the students in each group determined by the application of the standard described in subparagraph (1) of this paragraph and to improve the academic performance and achievement of students determined to be in the less academically advanced groups, by means of specially developed curricula, specially trained or certified instructional personnel, and periodic retesting to determine

> academic progress and eligibility for promotion; and
>
> (4) Validated by test scores or other reliable objective evidence indicating the educational benefits of such grouping.

In addition, section 185.43(d)(5) of the ESAA regulations provides:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy or procedure which results or has resulted in discrimination against children on the bases of race, color or national origin, including but no [sic] limited to:
>
> * * * *
>
> (5) Assigning students to ability groups, tracks, special education classes, classes for the mentally retarded, or other curricular or extracurricular activities on the basis of race, color or national origin. Racially or ethnically identifiable groups, tracks, or classes which cannot be justified educationally under the criteria set out in paragraph (c) of this section shall be presumed to

> be assigned on the basis of race, color or national origin.

During FY 1978 and FY 1979, the district was found ineligible for ESAA funding under sections 185.43(c) and (d)(5) of the regulations because it assigned students to racially/ethnically isolated and identifiable classes that could not be justified educationally under the criteria set out in section 185.43(c)(1)-(4). These determinations were based on analyses of classes in schools and programs enrolling between 20 and 80 percent minority students. Moreover, the analyses excluded classrooms used for bilingual, special education, pre-school and kindergraten [sic] programs.

In its application for a waiver of ineligibility for FY 1979 ESAA funding, the district made several commitments to ensure that no student is assigned to a racially/

ethnically identifiable or isolated classroom except when the assignment can be justified educationally under the criteria in section 185.43 (c)(1)-(4) of the regulations. These commitments satisfied the requirements for obtaining a waiver of ineligibility on this issue. 45 CFR 185.44(e), (f)(3). On the basis of these commitments, the district was notified in a letter dated September 15, 1979, that its waiver application was adequate to remedy the discrimination found in assigning students to classes in the district's regular education program.

The school district now admits, however, that it has not implemented the remedial actions described in last year's application for a waiver of ineligibility. In a letter dated May 5, 1980, the district stated:

> Due to the Department's failure last year to provide the District with a

> waiver of ineligibility on all issues, thereby furnishing the District with 1979 ESAA funds, the District did not implement the terms of the waiver agreement reached last year on this issue.

Because the district has not implemented the agreed upon remedy, its discriminatory classroom assignment practices have not ceased to exist. Thus, the district remains ineligible for FY 1980 ESAA funds under sections 606(c)(1)(C) and (D) of the Act, as interpreted by sections 185.43(c) and (d)(5) of the regulations, based on its assignment of students to racially/ ethnically identifiable and isolated classrooms without adequate educational justification.

3. Bilingual Education

Section 185.43(d)(2) of the ESAA regulations provides:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy, or

> procedure which results or has resulted in discrimination against children on the basis of race, color, or national origin, including but not limited to:
>
> * * * * *
>
> (2) Denying equality of educational opportunity or otherwise discriminating against national origin minority children on the basis of language or cultural background.

During FY 1979, the district was found ineligible for ESAA funding under section 185.43(d)(2) of the regulations because it had failed to implement certain provisions of the Plan relating to the delivery of instructional services to non- and limited English speaking students. These included provisions on staffing for bilingual programs and developing a program of linguistically appropriate special education services.

Subsequently, in its application for a waiver of ineligibility, the district made

additional commitments in each of these areas. The district stated that by September 15, 1979, it would hire, assign, and/or reassign adequate numbers of bilingual and TESL teachers to meet minimum staffing requirement [sic] in all Group I and Group II bilingual programs. These minimum staffing requirements were to be determined on the basis of agreed upon staffing formulas for Group I and Group II programs. Additionally, under the Model for the Provision of Linguistically Appropriate Special Education Services (Model) submitted with its waiver application, the district is obligated to employ the number of bilingual endorsed and special education certified teachers needed to meet the special education needs of handicapped non-and limited English speaking students. The number of such teachers to be employed was to be

determined on the basis of the criteria contained in the Model and the number of students requiring such services as determined by the district's annual needs assessment. The Model provided further that if the district could demonstrate that it had exhausted all recruitment and hiring possibilities without obtaining the requisite number of bilingual special education teachers, it could utilize bilingual paraprofessionals as an interim measure while it continued its efforts to recruit and hire professional staff. Since these commitments satisfied the requirements for obtaining a waiver of ineligibility on these issues, the district was notified on September 15, 1979, that its waiver application was adequate with respect to these matters.

It is now evident that the district has not fully implemented the staffing

commitments contained in last year's application for a waiver of ineligibility. The information provided by the district during and after the show cause meeting on March 27, 1980, shows the following:

1. Group I Staffing - In its "Status Report of Bilingual Education Programs" submitted at the show cause meeting, the district states that "[a]s of March 25, 1980, of 218 bilingual programs, 164 met the minimum staffing requirements described in the waiver. In the remaining 54 programs a total of 81 bilingual teachers were needed."

2. Group II Staffing - Similarly, the "Status Report of Bilingual Education Programs" shows that as of March 25, 1980, 8.5 bilingual teachers and 7 TESL teachers were

still needed to staff Group II programs.

3. Linguistically Appropriate Special Education Services - In its "Report on the District Special Education Staffing Needs for the 1979-80 School Year" submitted to OCR on May 6, 1980, the district also acknowledged that it has not employed sufficient numbers of teachers or paraprofessionals to meet the special education needs of handicapped non- and limited English speaking students. The report states that 34.5 Spanish endorsed special education teachers in 15 handicapping conditions are needed to serve Hispanic students in broad incidence programs. To date,

however, the district has employed only 20 teacher aides. Thus, even though the district has made significant progress during the first year of its formal bilingual special education program, it is not fully meeting the educational needs of these students.

In conclusion, because the district has not satisfied the staffing commitments for Group I, Group II and bilingual special education programs in last year's waiver agreement, it is ineligible for ESAA funding under section 606(c)(1)(D) of the Act, as interpreted by section 185.43(d)(2) of the regulations.

Reestablishing Eligibility for ESAA Funds

The district may remove the three additional bases of ineligibility for ESAA

funds in one of two ways. It may request an opportunity to show cause why these ineligibility determinations should be revoked and its applications considered for funding; or it may correct the violations and apply for a waiver of ineligibility. A request for a show cause cause [sic] conference should be directed to:

> Dr. Shirley McCune
> Acting Deputy Assistant Secretary
> Equal Educational Opportunity Programs
> Department of Education
> Room 2001, FOB #6
> 400 Maryland Avenue, S.W.
> Washington, D.C. 20202

The request must be received, not merely sent, within 14 days of the date of this letter.

If the district requests the show cause opportunity, an informal conference with representatives of the district will he [sic] held within seven days of the receipt of the request. The purpose of this conference is to give the district an

opportunity to demonstrate that the facts supporting our determinations are inaccurate and to provide additional information which may alter those determinations. The conference is not a forum for working out the terms of an application for a waiver of ineligibility.

If the district chooses to take action to correct the violations cited, it may apply for a waiver of ineligibility pursuant to section 606(d) of the Act (20 U.S.C. 3196(d)) and section 185.44 of the implementing regulations (45 CFR 185.44). An application for a waiver of ineligibility must include information and assurances which show that any activity resulting in ineligibility has "ceased to exist" and will not reoccur after the submission of the waiver application (20 U.S.C. 3196(d)(1); 45 CFR 185.44(b)).

Specifically, an application for a waiver of ineligibility for the three additional bases of ineligibility cited in this letter must contain the information and materials required by the following provisions of the ESAA regulations:

1. Teacher Assignment

45 CFR 185.44(d)(3): In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by 185.43(b)(2), such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such non-discriminatory assignments shall, in the case of a local

educational agency implementing a plan described in 185.11(a), conform to the requirements of such plan with respect to the assignment of faculty....

2. Classroom Segregation

45 CFR 184.44(e): In the case of ineligibility under Section 185.43(c), an application for waiver shall contain:

(1) Evidence that minority group children are not separated from nonminority group children by or within classes for more than 25 percent of the school day classroom periods, except in instances of bona fide ability grouping which meet the requirements of section 185.43(c), where such agency

has demonstrated by clear and convincing evidence that such separation is educationally necessary and is the only available method of achieving a specific educational objective; and

(2) A statement of steps taken by such agency to insure that separation of minority and nonminority group children as prohibited by section 185.43(c) will not reoccur in the future.

45 CFR 185.44(f)(3): (i) In the case of the assignment of students to racially or ethnically identifiable groups, tracks, or classes which cannot be justified educationally, as described in Section

185.43(d)(5), an educational agency shall submit the following information...

(B) If the assignment was to other groupings, evidence that the students so assigned have been nondiscriminatorily reassigned to groupings that are not racially or ethnically identifiable, or evidence that the students so assigned have been reassigned to groupings in accordance with the criteria in Section 185.43(c)(1)-(3).

(ii) If the educational agency reassigns any student to new grouping under paragraph

(f)(3)(i) of this section, it shall also submit evidence that it has made provision for such transitional services as are necessary to enable the student to participate meaningfully in the educational program of the new grouping.

3. Bilingual Education

45 CFR 185.44(f)(1): In the case of a denial of equal educational opportunity to national origin minority group children as described in section 185.43(d)(2), such agency shall submit an educational plan of sufficient comprehensiveness to remedy or eliminate the effects

> of such denial and to meet the special educational needs of all national origin minority group children for whose education such agency is responsible. Such a plan, if required and approved under this subparagraph, shall be implemented regardless of whether funds for such purposes are made available under the Act.

Waiver applications are reviewed by the Office for Civil Rights, Department of Education, and decisions as to whether a waiver should be granted are made by the Secretary to the Department. The waiver application should be directed to:

> Ms. Cynthia G. Brown
> Acting Assistant Secretary
> Office for Civil Rights
> Department of Education
> 400 Maryland Avenue,. S.W.
> Washington, D.C. 20202

If the district intends to apply for a waiver, the request must be received with

the [sic] 21 days of the date of this letter or, if the district requests a show cause conference, within 21 days of the date of the letter notifying you of the results of the conference. In the absence of such a request, we will not feel constrained to reserve funds for an application that is approvable in other respects.

This letter relates solely to your district's eligibility for ESAA assistance. The establishment of eligibility does not, by itself, ensure that an application will be funded. An application also must satisfy other requirements applicable to the ESAA program, and its application must compete successfully with those of other school districts.

Sincerely,

Thomas K. Minter
Assistant Secretary for
Elementary and Secondary
Education

cc: Chief State School Officer
Assistant Secretary for Civil Rights
Regional Director, Region V, Office
for Civil Rights
Frank Cicero, Kirkland and Ellis

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff, vs. BOARD OF EDUCATION OF THE CITY OF CHICAGO, Defendant. | CIVIL ACTION NO. _____ (Filed September 24, 1980) COMPLAINT |

The United States, by its attorneys, alleges:

1. This is an action brought by the Attorney General on behalf of the United States to enforce the provisions of Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.; the regulations of the United States Department of Health, Education and Welfare (now the Department of Education and hereinafter "HEW" with reference to all times before the change) which

implement Title VI, 45 C.F.R. Parts 80 and 81; the Fourteenth Amendment to the United States Constitution, and the contractual assurances made by defendant Board of Education of the City of Chicago (hereinafter "Board of Education") in consideration of its continuing receipt of federal financial assistance.

2. This Court has jurisdiction of this action under 28 U.S.C. 1345, under 42 U.S.C. 2000c-6 and under 42 U.S.C. 2000d-1.

3. The Attorney General of the United States has received written complaints signed by parents of children attending schools operated by the Board of Education alleging that their minor children are members of a similarly-situated class which is being denied the equal protection of the laws by the Board of Education. The Attorney General believes these complaints to be meritorious and has certified that said parents are unable to

initiate and maintain appropriate legal proceedings to afford their children and the similarly-situated class appropriate legal redress. Further, the Attorney General has certified that the institution of this action will materially further the orderly achievement of desegregation in the public schools operated by the defendant. Finally, the Attorney General has notified the Board of Education of the complaint and of his determination that the Board of Education is operating in non-compliance with the Equal Protection Clause of the Fourteenth Amendment and with Titles IV and VI of the Civil Rights Act of 1964, and he has certified that the Board of Education and its agents have had a reasonable time to adjust the conditions alleged in the complaint. The certificate of the Attorney General is attached hereto and incorporated herein.

4. The Board of Education is a public body created by the State of Illinois to administer and supervise the public schools within its statutorily-defined area and, under the laws of the State of Illinois, may sue and be sued. S.H.A., Ch. 122, §34.2. Its principal offices are at 228 North LaSalle Street, Chicago, Illinois.

5. The Board of Education is receiving and at all times material has received federal financial assistance.

6. To qualify for federal financial assistance, the Board of Education submitted Assurances of Compliance with the provisions of Title VI of the Civil Rights Act of 1964 and the HEW regulations promulgated thereunder.

7. On April 9, 1979, HEW notified the Board of Education that under 45 C.F.R. 185.43(d), it was ineligible to receive

federal funds distributed under the Emergency School Aid Act, 20 U.S.C. 1601 et seq. (hereinafter "ESAA") because its racial segregation of students violated Title VI.

8. On September 17, 1979, HEW informed the Board of Education that HEW would initiate the referral of this matter to the United States Department of Justice in one month if, by then, the Board of Education had not rebutted or explained HEW's findings that the Board of Education was in violation of Title VI and had not developed a plan to remedy its unlawful discrimination.

9. On October 17, 1979, HEW received a letter from the Board of Education's General Superintendent, Dr. Joseph P. Hannon, who, writing on behalf of the Board of Education, specifically denied that it had violated the Fourteenth Amendment to the Constitution, the

Civil Rights Act of 1964, as amended, or decisions of courts interpreting the same.

10. On October 18, 1979, the Director of HEW's Office for Civil Rights notified the Board of Education that HEW would refer the case against it to the Department of Justice unless the Board of Education submitted an acceptable desegregation plan within ten (10) days.

11. The Secretary of HEW received no acceptable plan from the Board of Education by October 28, 1979, and determined that the Board of Education would not comply voluntarily with the provisions of Title VI and the Assurances referred to in paragraph 6, above.

12. On October 29, 1979, the Secretary of HEW referred this matter to the Department of Justice, requesting that the Department take appropriate legal action to secure

compliance by the Board of Education with Title VI and said Assurances.

13. The Board of Education applied for ESAA funding for the 1980-81 school term. HEW again found the Board of Education ineligible for funding because the Board of Education had unlawfully segregated students on the basis of race. Following a presentation of facts by the Board of Education in defense of its actions, these HEW determinations were reaffirmed by the Department of Education on June 12, 1980.

14. Current racial segregation of students in the public schools operated by the Board of Education has been caused, in substantial part, by the actions and omissions of the defendant.

15. Specific practices of the Board of Education which have unlawfully segregated students on the basis of race and ethnic

origin (Hispanic) include, but are not limited to, the following:

(a) The drawing and alteration of school attendance area boundaries in such a way as to create, maintain or increase racial or ethnic segregation of students;

(b) The adjustment of grade structures among schools so as to create or maintain racial or ethnic segregation;

(c) The maintenance of racially and ethnically segregated branches of schools;

(d) The placement of permanent and temporary facilities to relieve student overcrowding and the failure to use alternative, educationally sound measures to relieve student overcrowding so that, by action and omission, racial and ethnic segregation of students was created and maintained;

(e) The maintenance of a racially-disproportionate number of severely overcrowded and thereby educationally inferior schools in such a way as to identify, in conjunction with the practices described in the next two subparagraphs, those schools as intended for black students and less crowded schools as intended for white students;

(f) The assignment of teachers and staff to schools in such a way as to match the race of the faculties with the race of the students attending the schools;

(g) The employment of a permissive transfer policy which allowed white students to avoid attending their schools of assignment when their race was in the minority in favor of attendance at other

schools where their race constituted the majority of student enrollment; and

(h) The association of segregated schools with segregated housing projects.

16. The practices listed in paragraph 15, above, occurred over a substantial period of time and in a substantial portion of the Chicago public schools, and constitute a system-wide violation of the Constitution and the laws of the United States.

17. Unless restrained by order of this Court, the Board of Education will continue to maintain and operate the Chicago public schools in violation of the Constitution and laws of the United States, resulting in immediate, severe and irreparable harm. No adequate remedy is available at law.

WHEREFORE, plaintiff, United States of America, prays that this Court enjoin defendant, its agents, employees and all

persons in active concert or participation with it from discriminating against pupils on the basis of race and ethnic origin and from failing to operate said school system lawfully, by implementing such plan of desegregation as this Court may order.

Plaintiff further prays this Court to grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

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CERTIFICATE OF THE ATTORNEY GENERAL

I, Benjamin R. Civiletti, Attorney General of the United States, hereby certify that I have received complaints in writing signed by parents of minor children in Chicago, Illinois, alleging in effect that said children are being deprived by the Board of Education of the City of Chicago of the equal protection of the laws; that I believe the complaints to be meritorious; that the signers of the complaints are unable, in my judgment, to initiate and maintain appropriate legal proceedings for relief; that the Board of Education was notified of the complaint; that I am satisfied that said Board of Education has had a reasonable time to adjust the conditions alleged in the complaint; and that in my judgment the institution of this action, United States v. Board of Education of the City of Chicago, will materially further

the orderly achievement of desegregation in public education.

This certificate is made pursuant to the provisions of Section 407(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, in support of the complaint to which it is attached.

Signed this 23rd day of September, 1980.

BENJAMIN R. CIVILETTI
Attorney General

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois

Eastern Division

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | No. 80 C ____ |
| Plaintiff, | ) | |
| | ) | (Entered |
| vs. | ) | September 24, |
| | ) | 1980) |
| BOARD OF EDUCATION OF THE CITY OF CHICAGO, | ) | |
| | ) | |
| Defendant. | ) | |

**CONSENT DECREE**

1. The United States has filed a complaint alleging that the Board of Education of the City of Chicago (the "Board") has engaged in acts of discrimination in the assignment of students and otherwise, in violation of federal law. The United States alleges further that such acts have had a continuing system-wide effect of segregating students on a racial

and ethnic basis in the Chicago public school system.

2. In addition, the United States Department of Health, Education and Welfare ("HEW") in 1979 and in 1980 found the Board ineligible for funding under the Emergency School Aid Act on the basis of its determinations that the Chicago public school system is characterized by racially segregated and overcrowded schools. Following a presentation of facts by the Board in defense of its actions, these HEW determinations were reaffirmed by the Department of Education on June 12, 1980.

3. The Board neither admits nor denies the allegations of the complaint in this action. It recognizes, however, that the Chicago public school system is characterized by substantial racial isolation of students.

4. The Board believes that racial isolation is educationally disadvantageous to all students and that educational benefits will accrue to all students through the greatest practicable reduction in the racial isolation of students.

5. The Board believes that litigation of this action would require a substantial expenditure of public funds and a substantial commitment of Board and staff time and resources, at a time when financial and personnel resources are already greatly limited, and that such resources can more appropriately be used to achieve the educational goals of the school system. The parties further believe that litigation of this action would be protracted and that settlement of the action is in the public interest.

6. In light of these considerations, the parties, as indicated by the signatures of their counsel below, have determined to settle this action and resolve the United States' request for injunctive relief by entry of this consent decree. The parties submit to the jurisdiction of the Court and acknowledge that subject matter jurisdiction exists over this action under the Fourteenth Amendment of the United States Constitution; under Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c and 2000d; and under 28 U.S.C. § 1345. The Board waives the notice provisions of those acts. Both parties waive the entry of findings of fact and conclusions of law. Each party shall bear its own costs.

7. Both parties agree that this Consent Decree is final and binding as to the issues resolved herein. The Court shall

retain jurisdiction of this action for all purposes, until a final order is entered terminating this litigation.

8. In the event that objections or challenges are raised (e.g., through intervention or separate collateral lawsuits) to the lawfulness or appropriateness of (a) this decree, any provision hereof, or proceedings pursuant hereto, or (b) any aspect of the desegregation plan provided for in Part I hereof after approval of the plan by the Department of Justice or by the Court, the Board and the Department of Justice shall defend the lawfulness and appropriateness of the matter challenged. If any such collateral lawsuit arises in state court, the parties shall seek to remove such action to the U.S. District Court.

WHEREFORE, the parties having freely given their consent, the terms of the Decree being within the scope of the complaint, and the terms of the Decree being fair, reasonable and adequate, it is hereby ORDERED, ADJUDGED, and DECREED that:

## I. STUDENT DESEGREGATION

1. Systemwide Remedy. The Chicago Board of Education (the "Board") will develop and implement a system-wide plan to remedy the present effects of past segregation of Black and Hispanic students.

2. Basic Objectives.

2.1 Desegregated Schools. The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.

2.2. Segregated. In order to assure participation by all students in a system-wide remedy and to alleviate the effects of both past and ongoing segregation, the plan shall provide educational and related programs for any Black or Hispanic schools remaining segregated.

2.3 Participation. To the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups, and in all age and grade levels above kindergarten.

2.4 Fair Allocation of Burdens. The plan shall ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group.

3. Board Discretion in Plan Development.

3.1 Board Discretion in Selecting from Alternatives. The Department of Justice recognizes that there is a broad range of constitutionally acceptable plans that will fulfill the basic objectives stated in Part 2. The Department of Justice further recognizes the Board's familiarity with and sensitivity to the unique situation presented in Chicago, and the authority of the Board, in its discretion, to select from within the constitutional range the plan that best meets the needs of the Chicago School District.

3.2 Racial/Ethnic Balance or Specific Ratios Not Required. The parties recognize that courts have not

required specific racial ratios in schools as a necessary remedy in desegregation cases, that racial and ethnic balance throughout the Chicago School District is neither practicable nor required, and that no particular definition of a desegregated school is required.

4. Techniques. In establishing desegregated schools, the Board may use the following techniques, among others:

4.1 Voluntary Techniques.

4.1.1 Permissive transfers that enhance desegregation, with transportation at Board expense.

4.1.2 Magnet schools that enhance desegregation.

4.1.3 Voluntary pairing and clustering of schools.

4.1.4 If magnet schools or other voluntary techniques are used, each shall contain racial/ethnic goals and management controls (e.g., an alternative that would require mandatory re-assignments) to ensure that the goals are met.

4.2 Mandatory Techniques Not Involving Transportation.

4.2.1 Redrawing attendance areas.

4.2.2 Adjusting feeder patterns.

4.2.3 Reorganization of grade structures, including creation of middle schools.

4.2.4 Pairing and clustering of schools.

4.2.5 Selecting sites for new schools and selecting schools for closing to enhance integration.

4.3 Mandatory Reassignment and Transportation. Mandatory reassignment and transportation, at Board expense, will be included to ensure success of the plan to the extent that other techniques are insufficient to meet the objective states in § 2.1. The plan may limit the time or distance of mandatory transportation to ensure that no student shall be transported for a time or distance that would create a health risk or impinge on the educational process. These limitations may vary among different age and grade levels.

4.4 Priority and Combination of Techniques. The Plan may rely upon the techniques listed above and any other remedial methods in any combination that accomplishes the objective stated in § 2.1.

5. Exceptions.

5.1 Justification for Remaining Identifiable Minority Schools. With respect to any schools that remain identifiable as Black or Hispanic schools, the plan shall provide specific justification in terms of practicability (i.e., educational or practical considerations), in the context of the extent to which the plan as a whole achieves the objectives stated in Part 2.

5.2 Stably Integrated Schools. The Plan may create exceptions with

respect to individual schools which it shows are already stably integrated (or will become stably integrated by the time of implementation of the plan).

5.2.1 Initial Exception. The plan may exclude such schools from reassignment of students if the extent of integration is within a reasonable range of that to be achieved in the schools referred to in § 2.1.

5.2.2 Subsequent Exception. The plan may provide for the later exclusion from student reassignment of any initially included school that, through demographic changes or other

factors, promises to become stably integrated.

5.2.3 Subsequent Inclusion. The plan should include sufficient flexibility to enable any of the techniques outlined above to be applied to any school in which stability of integration is threatened by unforeseen circumstances.

6. Bilingual Education. The Board's legal obligations to provide bilingual education for non- and limited-English speaking students shall be discharged in a manner consistent with the overall objectives of the plan. To the extent that students who require bilingual education are reassigned, they shall not be reassigned in a manner that interferes with their participation in bilingual programs.

7. Compensatory Programs in Schools Remaining Segregated. To accomplish the objective stated in § 2.2, the plan will include specific programs for Black or Hispanic schools remaining segregated, in the following areas among others:

7.1 Remedial and compensatory educational programs.

7.2 Improved curricula and instructional and evaluative techniques (including the utilization of tests that validly measure student achievement) for academic, vocational and alternative educational studies.

7.3 Pre-service and in-service instruction for administrators, principals, teachers and other school personnel.

7.4 Selection, and evaluation of

the performance of, principals and supporting leadership staff.

7.5 Testing, counseling, guidance and student welfare.

7.6 Physical facilities, safety and security.

7.7 Supportive relationships between such schools and groups and institutions in the community and in government.

8. Overcrowding. The Board is encouraged but not required to eliminate overcrowded schools. The plan should provide, to the greatest extent practicable considering all the circumstances, for the elimination of racially disproportionate overcrowding of classrooms and school sites.

9. Discipline. The plan shall include provisions to ensure that discipline is administered in a non-discriminatory

manner. discipline is administered in a non-discriminatory manner.

10. Resegregation. The plan shall contain provisions to ensure against resegregation of students after implementation, in the following areas:

10.1 In-School. The plan shall include provisions to ensure that students attending desegregated schools are not resegregated within their schools without adequate educational justification. This provision shall apply to the assignment of students to classrooms as well as to programs of instruction.

10.2 Student Reassignment. The plan shall include provisions to ensure that students shall not be reassigned in a manner that,

considering the district as a whole, causes the resegregation of schools.

10.3 Structural Adjustments. The plan shall include provisions to ensure that site selections, construction, school closings, readjustments of attendance areas and fedder patterns, and new placement of mobile classrooms shall be accomplished so as not to cause the resegregation of schools.

10.4 Educational Program Adjustments. The plan shall include provisions for utilization in desegregated schools of such of the specific programs referred to in Part 7 hereof as the Board concludes are necessary to ensure against resegregation of such schools.

11. Facilitating Success of the Desegregation Process.

11.1 Community Involvement. The plan will establish programs to promote public involvement with and support for the desegregation process.

11.2 School Personnel. The plan will provide for pre-service and in-service training programs for Board personnel such as administrators, teachers, auxiliary staff, bus drivers and monitors.

11.3 Other Institutions. The Board shall endeavor to involve in the desegregation process state and local government, private businesses, colleges and universities, civic and community organizations, labor unions, professional organizations, religious and cultural institutions, the

parochial school system and other private schools.

12. Voluntary Interdistrict Pupil Transfers. The plan will include provisions, including without limitation the payment of transportation costs, to encourage and facilitate voluntary interdistrict pupil transfers having integrative effects between schools in the Chicago School District and schools in other districts in the Chicago Standard Metropolitan Statistical Area ("SMSA")

13. Reporting. The plan shall establish a system of recordkeeping and reporting through which the Board's compliance with the provisions of this agreement can be monitored.

14. Flexibility. The parties to this agreement recognize that neither the principles set forth above nor the

desegregation plan can provide for every contingency and that exceptions will be necessary. The burden is on the Board, however, to justify such exceptions on the basis of educational and practical considerations.

15. Financial Cost of the Plan.

15.1 Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

15.2 Each party reserves the right to seek to add additional parties who may be legally obligated to contribute to the cost of the desegregation plan.

15.3 The parties recognize that financial cost of implementation does

not excuse the failure to develop a desegregation plan consistent with the principles set forth in §§ 2-14, and is not a basis for postponement, cancellation or curtailment of implementation of the plan after it has been finally adopted, but is one legitimate consideration of practicability in meeting the objective stated in §2.1.

16. Time Table. The plan will be developed in accordance with the schedule set forth in Attachment A and will be implemented beginning with the 1981-82 school year.

17. Public Participation. The Board will receive and consider comments and recommendations from all persons and groups during the development of the desegregation plan.

18. Resolution of Disagreements. If the parties to this decree are unable to agree as to whether the desegregation plan is consistent with the principles set forth above in §§ 2 through 15, the disagreement will be submitted to the court for resolution.

## II. ADDITIONAL PROGRAMS AND PARTIES

1. Interagency Coordination. The Department of Justice agrees that it will, pursuant to the Attorney General's authority (including that under Executive Order 11764 to coordinate the enforcement of Title VI of the Civil Rights Act of 1964), initiate and carry forward discussions with other agencies of the federal government to bring about a coordinated affirmative administration of federal grant programs in the Chicago SMSA with the goal of

contributing to the creation and maintenance of stably integrated schools in the Chicago SMSA. These federal programs include, for example, housing, employment and transportation in addition to education.

2. State Responsibility.

2.1 The Department of Justice will thoroughly pursue and promptly complete its investigation of whether the State of Illinois should be made a party defendant and be required to assist and support, financially and otherwise, the implementation of the desegregation plan discussed in Part I. The investigation will examine whether the State and/or its agencies have contributed, through action and inaction, to the segregation of, or other discrimination against, students in the Chicago School District.

2.2 Upon completion of the investigation the Department will submit the factual findings thereof to the Court and, if warranted by the results of the investigation, promptly take such enforcement action as is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

3. Interdistrict Remedies.

3.1 The Department of Justice will thoroughly pursue and promptly complete its examination of the extent to which interdistrict remedies for segregative conditions in schools in the Chicago school district may be appropriate, including (without limitation) by reason of the possibilities that:

3.1.1 The State of Illinois together with school districts in the Chicago SMSA, or some of them, may have acted in effect as a metropolitan school district with respect to vocational, special and other educational programs; and

3.1.2 The State of Illinois together with State housing agencies and other agencies of state government, including units of local government in the Chicago SMSA, or some of them, may have contributed to the segregation of the races in the Chicago SMSA by racially discriminatory use of state or federal housing laws or programs, or of state or local land use control laws.

3.2 Upon completion of the investigation, the Department will

submit the factual findings thereof to the Court and will take whatever enforcement action is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

4. LEAA Grant Condition. The Department of Justice agrees that the entry of this consent decree is a sufficient basis for the removal, from the grant awarded by the Law Enforcement Assistance Administration to the Board on September 10, 1980 (#80-JS-AX-0043), of the condition relating to Title VI of the 1964 Civil Rights Act and § 815 of the Criminal Justice Improvement Act of 1979.

## III. OTHER ISSUES

1. Classroom Segregation. The Board will promptly implement a plan to ensure that no student is assigned to a racially/ethnically isolated or identifiable classroom except when the assignment is justified educationally. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under the Emergency School Aid Act ("ESAA") for Fiscal year 1979, which was found acceptable by the Department of Health, Education and Welfare ("HEW") and is presently acceptable to the Department of Education.

2. Bilingual Programs. The Board will promptly implement a plan to ensure that non- and limited English speaking students are provided with the instructional services necessary to assure their effective participation in the educational programs of

the Chicago School District. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.

3. Faculty Assignment. The Board will promptly implement a plan to assure that the assignment of full-time classroom teachers to schools will be made in such a manner that no school is identified as intended for students of a particular race, color or national origin. Except as specifically provided herein, the plan shall be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.

3.1 Not later than November 1, 1981, with respect to the full-time classroom teachers in each school faculty, the racial/ethnic composition and the proportion of experienced teachers will be between plus and minus fifteen percent of the systemwide proportions of such teachers with respect to such characteristics, and the range of educational training will be substantially the same as exists in the system as a whole.

3.2 The Board will make every good faith effort to follow professional staff assignment and transfer practices which, when taken together as a whole on a frequently reviewed periodic basis, will assure that the racial composition, the

experience and the educational background of individual school faculties and administrative staff more nearly approach* the city-wide proportions of minority, experienced, and more extensively trained professional staff; provided, however, that nothing in this Plan shall require the assignment or transfer of any person to a position for which he or she is not professionally qualified. The Board will not adopt or follow assignment and transfer practices which will foreseeably result in the racial identifiability of schools based on faculty or administrative staff composition or in

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* Plus or minus ten percentage points of city-wide averages for race, experience and training for each type of school facility.

unequal distribution of experienced and more extensively trained staff.

3.3 The failure of a particular school or schools to meet the guidelines will not constitute noncompliance with the above guidelines if the district provides a detailed satisfactory explanation justifying such failure to meet the guidelines.

_____
Date

ENTER:

_____
UNITED STATES DISTRICT JUDGE

_____

THE UNDERSIGNED CONSENT TO THE ENTRY OF THIS DECREE:

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Assistant Attorney General
Civil Rights Division
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**ATTACHMENT A**

**TIME TABLE FOR PLAN DEVELOPMENT**

The following timetable will be followed by the Board pursuant to Part I, § 16, except as modified by agreement between the Board and the Department of Justice or as extended by leave of Court:

| | |
|---|---|
| October 15, 1980 | Appointment of principal plan development consultant(s) |
| November 17, 1980 | Progress report to Justice Department |
| December 4, 1980 | Identification of plan components appropriate for funding in the basic and magnet categories under the Emergency School Aid Act and submission of appropriate funding proposals to the Department of Education |
| December 15, 1980 | Progress report to Justice Department |
| January 15, 1981 | Progress report to Justice Department |

| | |
|---|---|
| February 16, 1981 | Progress report to Justice Department<br><br>Prior to adoption of a plan by the Board, the Board will publish the proposed plan and hold public hearings thereon. |
| March 11, 1981 | Completion of final plan and adoption of plan by the Board. The plan will be conveyed to the Justice Department and filed with the Court. |

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| RICHARDS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No. 80 C 4261 |
| | ) | |
| BYRNE, et al. | ) | (Filed August |
| | ) | 11, 1981) |
| Defendants, | ) | |

COMPLAINT

Plaintiffs allege:

I

This is a proceeding for a declaration that the defendants have carried on and are continuing to carry on the operation of a particular school known as Walt Disney Magnet School as a racially discriminatory school within the City of Chicago, State of Illinois, in violation of Title 42, United States Code, Section 2000c and 2000d, and the covenants, conditions subsequent, and

restrictions contained in the Quitclaim Deed dated March 24, 1968, attached hereto as Exhibit 1 and made a part hereof, by and between the United States of America, Grantor and the City of Chicago, a Municipal Corporation of the State of Illinois and the Board of Education of the City of Chicago, quitclaiming a tract of land situated at 4141 North Clarendon Avenue, Chicago, Illinois, in Trust for public education purposes, and for a permanent injunction enjoining defendants from carrying on the racially discriminatory aspects of the operation of such Walt Disney Magnet School in the future and for other appropriate relief.

II

Jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1343. This is an action in equity

seeking relief under Title 42, United States Code, Section 1983. The rights sought to be protected are secured by the Fourteenth Amendment of the United States Constitution and by Title 42, United States Code, Sections 1981, 2000c and 2000d, providing for equal rights, nondiscrimination in public schools and for the protection of civil rights.

III

This is a class action brought by the adult palintiffs [sic] on behalf of themselves and their children or wards and on behalf of other adults and minors similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Members of the class are taxpayers citizens who reside in the County of Cook, State of Illinois, within the boundaries of the Walt Disney Magnet attendance District. All the

members of the class are similarly situated and affected by the action of defendants in operating and maintaining the Walt Disney Magnet School in a racially discriminatory manner. The class is so numerous that joinder of all members is impracticable. There are questions of both law and fact common to the class, and the claims of the named plaintiffs are typical of the class. The named plaintiffs will adequately represent all members of the class.

IV

The adult plaintiffs are taxpayers, teachers or parents or guardians of minor children who attend or are eligible to attend Walt Disney Magnet School. The minor plaintiffs attend or are eligible to attend Walt Disney Magnet School.

V

Defendant JANE BYRNE is the mayor of Defendant the CITY OF CHICAGO, grantee of the quitclaim deed attached hereto as Exhibit 1 and made a part hereof. Defendant, BOARD OF EDUCATION OF THE CITY OF CHICAGO is duly authorized by the law of the State of Illinois and is charged thereby with the duty of establishing, maintaining, and operating the Chicago School system and the Walt Disney Magnet School. Defendants, Rev. Kenneth Smith, Raul Villalobos, Sol Brandzel, Luis Salces, Edwin Claudio, Leon Davis, Martha Jantho, Rev. Wilfred Reid, Michael W. Scott, John D. Foster, are members of the Board of Education of the City of Chicago.

VI

Defendant Dr. Angeline Caruso is the acting Superintendent of Schools of the

Chicago School District. She holds office pursuant to the laws of the State of Illinois, and performs her duties under the authority and control of Defendant Board of Education of the City of Chicago.

VII

Defendant, Dr. Robert Gallagher is principal of Walt Disney Magnet School.

VIII

On information and belief, plaintiffs allege that Walt Disney School presently has approximately 1722 pupils in all grades, of whom about 29.9% are of the black race, 44.9% are of the white race, 19% are of the Hispanic race, and 6% are of other races. On information and belief, plaintiffs allege that Walt Disney Magnet School employs 111 teachers; 63% are of the white race, 26.2% are of the black race, 10.8% are of other minority ethnic [sic] or racial backgrounds.

There are 5 teacher aides; 2 being white, 0 being black, and 3 being of other minority ethnic [sic] or racial backgrounds.

IX

On March 24, 1968, defendants CITY OF CHICAGO and the BOARD OF EDUCATION OF THE CITY OF CHICAGO covenanted to utilize continuously the property described in Exhibit 1 hereto attached, for public educational purposes in accordance with a proposed program and plan as set forth in the application of the city [sic] of Chicago to the Department of Health, Education and Welfare dated September 14, 1967, attached hereto as Exhibit 2 and made a part hereof, and its resolution adopted January 10, 1968, attached hereto as Exhibit 3, and as further effected by a later program and plan entitled "Final Educational Specification" dated March 1969, commonly known as the

Leggett report, attached hereto and made a part hereof as Exhibit 4.

X

By the terms of said quitclaim deed dated March 24, 1968, (Exhibit 1), defendant CITY OF CHICAGO or the BOARD OF EDUCATION OF THE CITY OF CHICAGO, covenanted, inter alia, as a condition subsequent to the grant of said land, to comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare, 45 CFR Part 80 issued pursuant to that title and as in effect on the date of the said quitclaim deed, to the end that, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination

under the program and plan referred to in paragraph IX of this complaint or under any other program or activity of the City of Chicago or the Board of Education of the City of Chicago, its successors or assigns, to shich [sic] said Title VI and said Regulations apply by reason of the covenants heretofore referred. Exhibit 4, Leggett report.

XI

On or about March 1980 the Board of Education of the City of Chicago laid-off [sic] a total of 34 teachers, 46 bus aides and 1 teacher aide from Walt Disney Magnet School, more than any other elementary school within the City of Chicago and further cuts are programmed in the very near future. By virtue of said cuts in personnel the Board of Education of the City of Chicago has deliberately made it impossible

to comply with the conditions set forth in the quitclaim deed, Exhibit 1 hereto, and has breached and continues to breach said conditions and the agreed program and plan and the requirements of Title VI of the Civil Rights Act of 1964.

XII

Racial consideration entered into the Board's January 1980 decision to terminate 34 teachers from Walt Disney Magnet School in that a disproportionate number of minority teachers were terminated, thereby creating discriminatory racial imbalance in the school faculty, and in that said terminations with full knowledge of the Board of Education of the City of Chicago and its Administration impede the purpose of voluntary integration of Walt Disney Magnet School.

XIII

The pupil-teacher ratio is 22 to 1, higher than recommended by the plan and program and inconsistent with the goal and design of the school which utilizes open classrooms. This is particularly true for the Early Childhood Center, which deals with 3 to 6 year old children and lost more than 50% of its staff. This has resulted in lack of discipline, loss of individualized instruction, and increased noise level and has greatly reduced meaningful teaching and communication. The atmosphere and environment created, frightening to young children, is hardly conducive to voluntary integration and understanding among children and faculty of various races.

XIV

Because the January 1980 cuts eliminated all attendants in the buses and left the

driver alone to supervise each busload of children while driving in rush hour traffic, both white and minority parents have withdrawn or are seriously considering withdrawing their children from the school. This has contributed to the so-called "white flight" to the suburbs and the parochial schools and thus undermines voluntary integration.

XV

The Board of Education of the City of Chicago has consciously failed to implement the goals and purposes of the covenanted program and its ultimate goal of increasing desegregation of faculties and students through quality education and willing integration. For example, the Board has disregarded the development of curricula of unusual quality which would serve all parts of the community, including nonpublic

schools, and which would attract white families who are sending children to parochial schools and induce them to remain in the city. The Board has also placed in position of authority administrators and a principal who do not support and work against the principle of voluntary integration.

XVI

The failure to implement the goals and purposes covenanted with the Federal government is reflected in the disharmonious and inconsistent approaches taken by a staff ignorant of or insensitive to the goals of Walt Disney Magnet School, most particularly in the approach to team teaching and in the need for a creative individualized curriculum. New teachers have been brought into the school with no inservicing to help

them understand and adjust to the unique environment at Disney.

XVII

The defendants have adopted a policy which permits racial and socio-economic imbalance in the student population.

XVIII

Because of the deliberate policies of the Board of Education of the City of Chicago and its administrators, frustrating the goals of voluntary integration of teachers and students through voluntary busing and quality education, the school applications have declined from 2500 in 1979 to 1200 in 1980. During the period from November 1978 to December 1979 (prior to any Board cuts) more than 18 certified teachers resigned or transferred from the school.

XIX

The present school administrators have undermined effective team teaching by transferring teachers from one instructional area within the school to another area, and from one established team of teachers to another, for no apparent educational reason. Some of these teachers have filed their own individual complaints with the Equal Employment Opportunity Commission, and one teacher has already won her suit.

XX

The original program of parent and community participation and input is not being implemented. The Board of Education of the City of Chicago and the Principal of Walt Disney Magnet School consistently reject recommendations made by committees of the Walt Disney School Council that would increase integration. In 1980 there existed

a list of 150 parent volunteers for the first floor. These parents were never contacted by the school, and the Council's request for a parent coordinator was denied. Also, all Council requests to be included in administrative planning and decision-making were denied. The School Community Coordinator position, which existed for 10 years and which as a CETA position after 1975, was allowed to lapse when the principal failed to refill the vacancy with a new CETA worker [sic].

XXI

An important concept in the original specifications was the involvement of Northwestern University in teacher selection and training, and in curriculum development. This once-strong relationship, in existence for seven years, has been all but severed by the present administration.

XXII

The Board of Education of the City of Chicago deliberately and drastically cut the Communication Arts Center staff by one-half. The Center serves not only the Disney student population but also the entire public school system. Further, the Board has completely failed to implement the original plan to have this facility service the non-school community as well.

XXIII

The original process developed by the Disney Council and Northwestern University for selection of teachers has been disregarded by the current principal. As a result, teachers have been admitted who do not believe in open classroom teaching, integrated team teaching, and individualized instruction, and who lack the flexibility

needed to work successfully in the environment.

XXIV

Walt Disney Magnet School has an excess of uncertified teachers. On information and belief plaintiffs allege that as of February 1980 there were approximately 53 uncertified teachers (33% of the teaching staff).

XXV

The key to success at Walt Disney Magnet School is the fact that parents will choose voluntarily to send their children to a school of the highest quality, integrated by design. Also important is the input from parents and from the University community. The Board of Education of the City of Chicago, its Administration and the Principal of Walt Disney Magnet School have chosen intentionally not to implement the program and plan covenanted as the basis to

obtain voluntary desegregation. The result is that neither white, nor minority children, nor the society at large have the benefit of a quality integrated education.

XXVI

The acts and omissions of defendants as alleged in this complaint have denied, and will continue to deny to plaintiffs their right to equality in public education without regard to race and to freedom from discrimination in the operation of public schools. By reason of said acts and omissions, and particularly by reason of the breach of the covenants entered by defendants and the breach of the public trust, the rights of plaintiffs and the class they represent, protected under the Fourteenth Amendment to the United States Constitution and by Title 42, United States Code, Sections 1981, 1983, 2000c and 2000d,

have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law to redress the grievances herein set forth.

XXVII

Defendants will continue to engage in such discrimination against plaintiffs unless enjoined by an order of this court.

WHEREFORE, plaintiffs pray:

1. That after a full hearing this court declare that defendants have been and are carrying on a particular school known as Walt Disney Magnet School as a racially discriminatory school within the City of Chicago, State of Illinois, in violation of Title 42, United States Code, Section [sic] 1981, 1983, 2000c, 2000d and the Fourteenth Amendment of the United States Constitution,

and the covenants, condition subsequent, and restrictions contained in the Quitclaim Deed dated March 24, 1968 by and between the United States of America, grantor and the City of Chicago, a Municipal Corporation of the State of Illinois and the Board of Education of the City of Chicago, quitclaiming the land situated at 4141 North Clarendon Avenue, Chicago, Illinois in trust for public education purposes.

2. That after a full hearing this court permanently enjoin defendants from employing said Federal grant in carrying on and perpetuating the racially discriminatory aspects of the operation of said Walt Disney Magnet School within the City of Chicago which will have the effect of continuing and strengthening existing patterns of school discrimination and segregation in the City

of Chicago and particularly at Walt Disney Magnet School.

3. Ordering defendants to immediately promulgate detailed procedures to implement the covenants, plan and program contained in the proposal and Leggett report, and ordering defendants to implement said procedures immediately.

4. Awarding plaintiffs the reasonable costs and expenses of this action, including attorneys fees; and

5. Granting plaintiffs such other and further relief as may be just.

DATED August 11, 1980, 1980

Yvon D. Roustan,
attorney at Law [sic]

[signatures of apparent plaintiffs omitted.]

EXHIBITS ATTACHED TO THE COMPLAINT
ARE NOT REPRINTED HERE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| RICHARDS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | No. 80 C 4261 |
| | ) | |
| BYRNE, et al. | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

This is a class action brought by teachers, parents, and guardians of minor children who attend or are eligible to attend the Walt Disney Magnet School. The complaint alleges that the City of Chicago ("City") and the Board of Education ("Board") have operated, and are continuing to operate, the school in a racially-discriminatory manner in violation of both

Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000 et seq, and the covenants and restrictions contained in the original deed from the federal government to the City. Plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Before the court is defendants' motion to dismiss. Accepting all of plaintiffs' well-pleaded allegations as true, we nevertheless find that plaintiffs have failed to state a valid claim either under the civil rights laws or the terms of the contract. Defendants' motion is therefore granted.

The relevant, and apparently uncontested facts that emerge from a reading of the Complaint are as follows: On March 24, 1968, the United States, acting through the Department of Health, Education and Welfare, executed a deed granting to the City of Chicago surplus property adjacent to the

lakefront to be used for a school. Under the terms of the deed, the city agreed, inter alia, that, for a period of thirty years, the property conveyed would be utilized exclusively for public education in the manner set forth in its earlier application and that the school would be operated in full compliance with Title VI of the Civil Rights Act which prohibits racial discrimination in programs receiving federal assistance.

The application previously submitted by the City, whose terms were now incorporated in the deed, proposed the conversion of the site into a magnet school that would be open to children residing anywhere in Chicago. The student body, ranging from nursery through eighth grade, was to be heterogeneous with children from multi-ethnic and socio-economic backgrounds with

varied talents and learning abilities. The school would place an emphasis on individualized or small-group instruction and the student-teacher ratio was to be substantially less than the average ratio in the non-magnet schools in the district. A special communications-skills curriculum was to be developed which would focus on music, painting, the performing arts, and foreign languages, as well as the more traditional offerings in speech and writing. Cooperative arrangements would be entered into with local universities for the development of new and innovative programs and instructional methods; for evaluation of the effectiveness of existing programs; for direct classroom observation; and for the training of teachers. The faculty, like the student body, were to be multi-racial with members of both sexes. In the proposal the

City and the Board of Education expressed their commitment to an integrated school system providing quality education for all its students and their belief that the establishment of magnet schools was an important step towards implementing that goal. As part of a "new and dynamic" approach to realistically coping with the problems of racial segregation, a group of such schools (Disney was to be the first of seven), whose creative curriculum and superior faculty would naturally interest students from all races, could reverse or at least reduce the incidence of white flight and restore confidence in the city school system. See Revised Proposal (September 13, 1967) attached as Exhibit 2 to the Complaint.

As one would expect, these predictions proved overly optimistic. Plaintiffs allege

that defendants have reneged on their commitment and have materially departed from the terms of the original plan, with the result that the Disney School is no longer an effective tool for keeping white children within the system and thereby facilitating integration. Plaintiffs maintain that the foreseeable effects of defendants' continuing mismanagement of Disney will simply be increased white flight (as the school is no longer perceived as an attractive option), a declining applicant pool, and eventually a segregated facility.

The Complaint is essentially a litany of the various alleged wrongs the Board and the City have committed in their administration of the school:

> (1) As a result of the layoff of 34 teachers in January 1980, the current pupil-teacher ratio (22 to 1) is higher than that recommended by the plan and inconsistent with the goals of the school. The

reductions have especially affected the Early Childhood Center for children ages 3-6 which lost more than 50% of its staff.

(2) In January 1980, all bus attendants were eliminated with supervisory responsibility resting solely on the driver.

(3) Teachers have been hired without the special training needed to prepare them for the flexible environment of the school.

(4) The administration has undermined effective team teaching by transferring teachers from one instructional area to another at random, for no apparent educational reason.

(5) Almost one-third of the total teaching staff are uncertified.

(6) The Communications Arts Program, which was to have been Disney's primary instruction, was drastically cut and does not serve segments of the school community, as originally contemplated.

(7) The cooperative arrangement with Northwestern University has been abandoned.

(8) The administration has generally failed to develop a quality curriculum that would

> attract students to the school, disregarded parental input, and appointed principals and teachers who were hostile to the concept of voluntary integration.

As a result of these acts and omissions, plaintiffs allege that fewer parents will voluntarily send their children to Disney and the school has lost its effectiveness as a means of maximixing integration in the inner city.

TITLE VI CLAIMS

For purposes of this motion, we accept as true plaintiffs' contention that the educational and social atmosphere at Disney has greatly deteriorated in recent years and the resulting problems of student discipline, loss of individualized attention, course elimination, and teacher quality, have made a once-promising school less attractive than it could have been and consequently less effective on combating

segregation. Moreover, we will assume that some of those budgets cuts, e.g., teacher layoffs, have not been applied equally to all schools in the district and that Disney and its students have been disproportionately burdened by these governmental actions. Nevertheless, to the extent that the student body in Disney has received discriminatory treatment, in no way can that discrimination be characterized as racially-biased in either intent or effect.

Title VI is applicable only if a governmental action subjects a person to discrimination on the basis of race. Thus, at a minimum state actions must have a discriminatory effect.* Discriminatory

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* This court has previously held that discriminatory intent is an essential element to sustain a cause of action under Title VI as it is for actions funded on the Fourteenth Amendment. See Slocomb v. Community Consolidated. A (continued...)

effect exists when state action "impacts" more on one race than another or allocates burdens and benefits differentially so that black and white students are not treated substantially the same. This is clearly not the case here. The simple fact is that the Disney School has been, and continues to be, a fully-integrated institution. There are no allegations that its current racial composition is racially-unbalanced (thus depriving black children of their right to an integrated education) or that its black students are being treated any differently

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*(...continued)
recent opinion in the Seventh Circuit confirms our view. Cannon School District v. University of Chicago, 648 F,2d [sic] 1104 (7th Cir. 1981) at 1106-1109. It is obvious, however, that discriminatory intent cannot be said to exist in the absence of an initial discriminatory effect. That effect is lacking here.

than their white counterparts.* Whatever disadvantages and deprivations its student body has suffered have been shared by blacks and whites alike and indeed more whites than blacks have been adversely affected. The school presently has 1722 pupils in all grades. Less than one-third of those students are black (29.9%) -- almost half (45%) are white. It could hardly be said

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* The only allegations of a disparate impact concern teacher layoffs and reassignments where, plaintiffs assert, blacks bore a disproportionate burden. Yet, here too, the focus of plaintiffs' complaint is not on the rights of the teachers. This is not an employment discrimination suite seeking reinstatement. Rather, the contention is that teacher reductions have harmed the quality education of all students attending the school -- white or black. Insofar as the rights of the students are concerned, this is an undifferentiated harm bearing no relationship to racial discrimination. Teachers who claim to be victims of discrimination are, of course, perfectly free to press their claims elsewhere and indeed some have done so but that is not the subject of this lawsuit.

that the mismanagement of a school that is predominantly white has a disparate adverse effect on black students.

It is clear then that plaintiffs are not alleging, and cannot allege, that the current operation of the school differentially burdens black students but rather that the continued mismanagement of the school, by discouraging a larger applicant pool and contributing to white flight, would eventually produce a situation where an indeterminate number of black students at some future time would be deprived of the benefits of integrated education. Plaintiffs' argument may be characterized as a "nip-in-the-bud" theory -- state actions which equally burden students of all races may be proscribed on the theory that they will ultimately produce a segregated school system.

We find this construction to be overly broad. Permitting judicial inquiry into the legality of nondiscriminatory actions merely because of the possibility that the result of such action may be greater segregation in the future undermines the traditional autonomy of school boards to formulate basic educational policy and would engage this court in fruitless conjecture and speculation. The possible future effects of (presently) racially-neutral governmental action can simply not be determined with any accuracy. Virtually every school board decision may have some repercussions on the future integrative prospects of the school and, under plaintiffs' theory, all of them -- including such routine decisions like textbook and course selection, lunch menus, and length of recesses -- would be reviewable in court under the guise of

preventing future discrimination. Neither the language nor the legislative history of Title VI contemplates such a result. Title VI is remedial, not prophylactic; it does not mandate the prevention of possible future discrimination but only the elimination of that which currently exists. Because plaintiffs are unable to establish that the operation of Disney is currently discriminatory, their statutory claims must fail.

Moreover, if and when Disney does become a segregated school, the disadvantaged students will not necessarily be those who are currently in attendance. A class composed of members of the present student body and their parents does not adequately represent the interests of the real victims of future discrimination, whoever they may be, and therefore has no standing to assert

the rights of those future victims. Thus, even conceding that white children, as well as blacks, may attack a segregated system on the theory that "substantial benefits flow to both whites and blacks from interracial association" Lindmark Associates Inc. v. Willingbors, 431 U.S. 85 at 94-95 (1977), it is clear that children who are not victims of current discrimination and who are not being deprived of their rights to interracial association are unable to do so merely because some unknown group in the future would otherwise suffer.*

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* Under Association of Data Processing v. Lamp, 397 U.S. 150 (1970), a plaintiff has standing to assert statutory or constitutional rights where he (1) has suffered injury in fact; and (2) the interests allegedly infringed are arguably within the zone of interests intended to be protected by the statute or constitutional provision upon which the claim is based. Plaintiffs in this case have suffered no injury in fact through the elimination of programs and

(continued...)

Cf. Pasadena City Bd. of Education v. Spangler, 420 U.S. 424 (1976) (where the United States intervenes, civil rights action is not moot although all original plaintiffs have graduated from the system. In this case, the federal government has not intervened.) Nor can plaintiffs maintain this action on the basis of their financial support of the school system through taxation. See Flast v. Cohen, 392 U.S. 83 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923). Accordingly, even if a cause of action to prevent future discrimination would exist, plaintiffs lack standing to pursue it.

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*(...continued)
teaching positions. However, educational deprivations which are not racially-discriminatory are not within the zone of interests Title VI was intended to protect. Thus, plaintiffs have failed to meet the second wrong necessary for standing.

We recognize that the Chicago school system overall is residentially-segregated. However, plaintiffs may not use the general segregation prevailing in the city as a basis for attacking the nondiscriminatory programs of a single school. The existence of white flight and the segregation of Chicago school [sic] were not created by Disney, nor would those problems be eliminated by Disney's restructuring. Rather, the establishment of Disney and other magnet schools was a voluntary remedy chosen by the Board to implement its integrative goals. School boards necessarily have broad discretion in choosing their remedies and plaintiffs are not entitled to demand that a particular remedy be chosen or that, once chosen, it be effective as long as the particular remedy chosen does not in itself illegally

discriminate. As noted earlier, nothing in the current operation of the school is racially-discriminatory. If plaintiffs desire to attack the system as a whole, the appropriate remedy is not piecemeal tinkering with a single school but the formulation of a district-wide integration plan. This case, focusing on a minute aspect of a system-wide problem, is a totally ineffective vehicle for restoring Chicago's school crisis. Ordering changes in a single school, as plaintiffs would have this court do, on the theory that integration of the system will thereby be facilitated ignores the elementary fact that systemic change necessitates comprehensive planning.* Such a plan has already been

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* Thus, although even racially-neutral practices may be condemned when they have the effect of impeding the disestablishment of a dual system or (continued...)

formulated and in another case in this District is awaiting Judge Shadur's review and approval. There is no reason or justification for this court to impose its own additional terms.

In short, we reject plaintiffs' contention that they are entitled to challenge the Board's operations of Disney School, notwithstanding the lack of a present discriminatory effect within that school, on the theories that (1) continued

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*(...continued)
perpetuating the effects of past discrimination, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 at 538 (1979), here the effect on the system is miniscule at best. Granting plaintiffs all the relief they seek would do virtually nothing toward making Chicago an integrated system and accordingly, the fact that it is currently not furnishes no justification for recognizing their claim. The Complaint seeks change in a single school not the restructuring of the system, and we accordingly limit our inquiry to the discrimination existing in that school.

mismanagement of the school would eventually turn it into a segregated facility at some future date, or (2) its mismanagement is a contributing factor to the present overall segregation of the system. Mismanagement of an integrated school cannot, by definition, be racially-discriminatory and to the extent it contributes to a system-wide segregation, the remedy sought must be system-wide in scope. Since Disney is currently an integrated school and plaintiffs have pointed to no cutbacks which adversely affect the black students attending Disney more than the white students, they have failed to allege the discriminatory impact necessary for actions under Title VI. Their statutory claims must therefore be dismissed.

CONTRACT RIGHTS

Plaintiffs also assert rights founded directly on contract. In the deed running from the United States to the City, the City and the Board expressly covenanted to comply with Title VI and to operate a school in the manner set forth in their earlier proposal and application. The complaint alleges that, by reason of the same acts and omissions previously noted, defendants have failed to do so and, consequently, are liable for breach of contract. While plaintiffs were not parties to that contract, they contend that because the covenants were imposed for the benefit of the people of Chicago they may sue to enforce its terms in their capacity as third-party beneficiaries. In response, defendants argue that rights created by contract pose questions of state law which

this court may adjudicate solely under its pendent jurisdiction and, in the event federal statutory claims are dismissed, that jurisdiction may not, or at last should not, be exercised. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

Defendants' assumption that rights under a contract with, or a deed from, the federal government are coverned [sic] by state law is questionable at best. The rights and obligations of parties who enter into contracts with the United States are generally determined by reference to federal common law, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), which this court may adjudicate pursuant to 28 U.S.C. §1331 (general federal question jurisdiction) notwithstanding the pretrial dismissal of other federal claims. Federal common law has been held to govern the

construction and operation of federal contracts even in suits between two private litigants not involving the government. Bank of America National Trust and Savings Association v. Purnell, 352 U.S. 29 (1956). But cf. United States v. Yazell, 382 U.S. 341 (1966) (defense of coverture recognized under Texas law would prevent recovery by the SBA on a loan made to a married women) and Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) (conflicting private claims to federal lands leased under the Mineral Leasing Act of 1920 were governed by state, rather than federal law), both of which suggest a special sensitivity to the interests of states in the enforcement of their real property law. Moreover, both cases emphasize that federal common law is triggered by a "clear and substantial interest of the national government

outweighing the interest of the states ...". Wright, Federal Courts (2nd Ed.) §60 at 250. Where purported third-party beneficiaries, rather than the federal government, seek relief under a contract, arguably the federal interest in its construction is significantly weaker.* This is particularly true as to the threshold issue of whether the persons bringing the action are in fact intended beneficiaries entitled to sue or are merely incidental beneficiaries with no enforceable rights.** See Restatement of Contracts (Second) [Tentative Draft] §133.

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* It is unlikely, however, that the application of federal common law depends on the entity initiating the lawsuit.

** The covenants contain provisions for waiver by the united States which imply that the enforcement of the contract qua contract was to be solely at the discretion of the grantor.

It is our judgment, however, that the applicable source of law need not be determined. Even assuming that plaintiffs are third-party beneficiaries and that their rights under the contract are governed by federal, rather than state, law, their contract claims still warrant dismissal. Plaintiffs allege that defendants' mismanagement of Disney breached the contract in two respects: (1) it was racially-discriminating in violation of Title VI; (2) it departed from the specifications outlined in the City's earlier proposal which was incorporated by reference into the contract. Neither contention has merit.

To the extent allegations of breach are predicated on violations of Title VI, our holding that Title VI has not been violated is equally dispositive of the contract

claim. To the extent the contract embodies an undertaking to operate a school in accordance with a previously submitted plan, we do not construe the contract as requiring literal compliance with every point in the City's proposal, the terms of which are extraordinarily detailed. Moreover, under the contract, any breach of covenant would result in a forfeiture and a reverter to the United States. It is highly unlikely that the parties ever intended such a draconian result to follow upon the slightest departure from the City's proposals. Both parties certainly were aware that changing economic circumstances could in the future necessitate layoffs, curricular revisions, and other modifications, and it would be wholly unreasonable to construe the contract as committing the City to a particular

program for thirty years with no possibility of reasonable change or accommodation.*

The breaches which plaintiffs have alleged do not constitute a breach of contract which supports the relief plaintiffs seek. Accordingly, the contract claims too must be dismissed.

O R D E R

For the reasons stated above, we find that plaintiffs have failed to state a claim. It is therefore ordered that defendants' motion to dismiss be granted and

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* The language of contracts should be construed in a manner consistent with the understandings and expectations of the parties. We think both parties clearly understood that some deviation at some point in the future was inevitable and that the City merely committed itself to the maintenance of a magnet school along the lines of the one described in the proposal. This much the City has continued to do and has therefore not breached its essential obligation.

that the Complaint be dismissed on all counts.*

Susan Getzendanner
United States District
Judge

DATED: August 31, 1981

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* Our disposition of the case makes it unnecessary to consider the argument of the City defendants that the City may not be held responsible for administrative decisions made by the Board.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
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| RICHARDS, et al., | ) | |
| | ) | |
| PLAINTIFFS, | ) | |
| | ) | |
| v. | ) | File NO. 80C 4261 |
| | ) | |
| BYRNE, et al. | ) | (Filed September |
| | ) | 11, 1981) |
| DEFENDANTS | ) | |

FIRST AMENDED COMPLAINT

Plaintiffs allege:

I

This is a proceeding for a declaration that the defendants have carried on and are continuing to carry on the operation of a particular school known as Walt Disney Magnet School as a racially discriminatory school within the City of Chicago, State of Illinois, in violation of Title 42, United States Code, Section 2000c and 2000d, and the covenants [sic] conditions subsequent,

and restrictions contained in the Quitclaim Deed dated March 24, 1968, attached hereto as Exhibit 1 and made a part hereof, by and between the United States of America, Grantor and the City of Chicago, a Municipal Corporation of the State of Illinois and the Board of Education of the City of Chicago, quitclaiming a tract of land situated at 4141 North Clarendon Avenue, Chicago, Illinois, in Trust for public education purposes, and for a preliminary and a permanent injunction enjoining defendants from carrying on the racially discriminatory aspects of the operation of such Walt Disney Magnet School in the future and from denying the named minor plaintiffs admission to Walt Disney Magnet School solely because of their race or color, and for other appropriate relief.

II

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1343. This is an action in equity seeking relief under Title 42, United States Code, Section 1983. The rights sought to be protected are secured by the Fourteenth Amendment of the United States Constitution and by Title 42, United States Code, Sections 1981, 2000c and 2000d, providing for equal rights, nondiscrimination in public schools and for the protection of civil rights.

III

This is a class action brought by the adult plaintiffs on behalf of themselves and their children or wards and on behalf of other adults and minors similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Members of the classes are

black and white and other minority taxpayers citizens who reside in the County of Cook, State of Illinois, within the boundaries of the Walt Disney Magnet attendance District. All the members of each class are similarly situated and differentially affected by the action of defendants in operating and maintaining the Walt Disney Magnet School in a racially discriminatory manner. The classes are so numerous that joinder of all members is impracticable. There are questions of both law and fact common to each class, and the claims of the named plaintiffs are typical of the classes. The named plaintiffs will adequately represent all members of each class.

IV

The black and other minority adult plaintiffs are taxpayers, teachers or parents or guardians of minor black and

other minority children who attend or are eligible to attend Walt Disney Magnet School. The black and other minority minor plaintiffs attend or are eligible to attend Walt Disney Magnet School. The white and other minority plaintiffs are taxpayers, teachers or parents or guardian [sic] of minor white children who were refused admission to Walt Disney, or attend or are eligible to attend Walt Disney Magnet School. The white minor plaintiffs were refused admission to Walt Disney, or attend or are eligible to attend Walt Disney Magnet School.

V

Defendant JANE BYRNE, is the mayor of Defendant the City of Chicago, grantee of the quitclaim deed attached hereto as Exhibit 1 and made a part hereof. Defendant, BOARD OF EDUCATION OF THE CITY OF

CHICAGO is duly authorized by the law of the State of Illinois and is charged thereby with the duty of establishing, maintaining, and operating the Chicago School system and the Walt Disney Magnet School, [sic] Defendants, Raul Villalobos, Kenneth Smith, Sol Brandzel, Luis Salces, Edwin Claudio, Rosemary Janus, Martha Jantho, Rev. Wilfred Reid, Betty Bonow, John D. Foster, are members of the Board of Education of the City of Chicago.

VI

Defendant Dr. Ruth Love is the present Superintendent of schools of the Chicago School District. She holds office pursuant to the laws of the State of Illinois and performs her duties under the authority and control of Defendant Board of Education of the City of Chicago. Defendant Dr. Angeline

Caruso is the past acting Superintendent of Schools of the Chicago School District.

VII

Defendant, Mr. Howard M. Sloan is District 2 Superintendent. And defendant, Dr. Robert Gallagher is Past Principal of Walt Disney Magnet School. Defendant, John J. Bean is the current Interim-principal of Walt Disney Magnet School.

VIII

Plaintiffs allege that on October 31, 1980, Walt Disney School had approximately 1743 pupils in all grades, of whom about 31.7% were of the black race, 44.3% were of the white race, 17.6% were of the Hispanic race, and 6.3% were of other races. Plaintiffs allege that on October 31, 1980 Walt Disney Magnet School employed 112 of other minority ethnic [sic] or racial backgrounds. There are 5 teacher aids; 2

being white, 0 being black, and 3 being of other minority ethnic [sic] or racial backgrounds.

IX

On March 24, 1968, defendants CITY OF CHICAGO and the BOARD OF EDUCATION OF THE CITY OF CHICAGO covenanted to utilize continuously the property described in Exhibit I hereto attached, for public educational purposes in accordance with a proposed program and plan as set forth in the application of the City of Chicago to the Department of Health, Education and Welfare, dated September 14, 1967, attached hereto as Exhibit 2 and made a part hereof, and its resolution adopted January 10, 1968, attached hereto as Exhibit 3, and as further effected by a later program and plan entitled "Final Educational Specification" dated March, 1969, commonly known as the

Leggett report, attached hereto and made a part hereof as Exhibit 4; the Chicago Board of Education Board Report No. 73-267-15, dated March 28, 1973 attached hereto and made a part hereof as Exhibit 4A regarding pupil enrollment policy, as reviewed from time to time according to Racial, Ethnic Survey of Students in Area C (Districts 1-7). See Summary of Racial/Ethnic Survey by District, dated 10-31-80, attached hereto and made a part hereto as Exhibit 4B.

X

By the terms of said quitclaim deed dated March 24, 1968, (Exhibit 1), defendant CITY OF CHICAGO or the BOARD OF EDUCATION OF THE CITY OF CHICAGO, covenanted, inter alia, as a condition subsequent to the grant of said land, to comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to

the Regulation of the Department of Health, Education, and Welfare, 45 CFR Part 80 issued pursuant to that title and as in effect on the date of the said quitclaim deed, to the end that, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the program and plan referred to in paragraph IX of this complaint or under any other program or activity of the City of Chicago or the Board of Education of the City of Chicago, its successors or assigns, to which said Title VI and said Regulations apply by reason of the covenants heretofore referred. Exhibits 4A an [sic] 4B.

XI

Racial considerations entered into the Boards [sic] August 17, 1981 decision to

exclude without procedural safeguards, from participation in Walt Disney Magnet School approximately 86 white students who had been accepted for the academic year 1981 and without offering them alternatives. Said exclusion represents approximately 97% of all white students accepted for 1981 and 43% of all students accepted the same year. As a result the entering Students [sic] at Walt Disney Magnet schools [sic] consists almost entirely of minority children. The apparent stable integration of Walt Disney Magnet School exists no longer for the current action of the Board disintegrates the balance heretobefore [sic] existing between the student racial percentages and the percentage of students attending Area C (District 1 to 7). See Exhibits 4A and 4B.

XII

The above cuts are but the beginning and the latest result of less obvious examples of racial discrimination consisting of "apparently" racially-neutral acts of selective mismanagement which, nonetheless, can ultimately be traced to a racially discriminatory purpose, which encourage white flight (in contrast to Minority flight of which there is none obvious) in the context of a school voluntarily integrated by plaintiffs (not the Board) and the current differential discrimination against both white [sic] and minorities. Such examples were fully stated in the original complaint and are here restated (with some modification) as follows:

1. On or about March, 1980 the Board of Education of the City of Chicago laid-off a total of 34 teachers, 46 bus aids and 1

teacher aide from Walt Disney Magnet School, more than any other Elementary [sic] school within the City of Chicago, and further cuts are programmed in the very near future. By virtue of said cuts in personnel the Board of Education of the City of Chicago has deliberately made it impossible to comply with the conditions set forth in the quitclaim deed, Exhibit 1 hereto, and has breached and continues to breach said conditions and the agreed program and plan and the requirements of Title VI of the Civil Rights Act of 1964.

2. Racial consideration entered into the Board's January, 1980 decision to terminate 34 teachers from Walt Disney Magnet School in that a disproportionate number of minority teachers were terminated, thereby creating discriminatory racial imbalance in the school faculty, and in that

said terminations with full knowledge of the Board of Education of the City of Chicago and its Administration impede the purpose of voluntary integration of Walt Disney Magnet School.

3. The pupil-teacher ratio is 22 to 1, higher than recommended by the plan and program and inconsistent with the goal and design of the school which utilizes open classrooms. This is particularly true for the Early Childhood Center, which deals with 3 to 6 year old children and lost more than 50% of its staff. This has resulted in lack of discipline, loss of individualized instruction, and increased noise level and has greatly reduced meaningful teaching and communication. The atmosphere and environment created, frightening to young children, is hardly conducive to voluntary

integration and understanding among children and faculty of various races.

4. Because the January, 1980 cuts eliminated all attendants in the buses and left the driver alone to supervise each busload of children while driving in rush hour traffic, both white and minority parents have withdrawn or are seriously considering withdrawing their children from the school. This has contributed to the so-called "white flight" to the suburbs and the parochial schools and thus undermines voluntary integration [sic] voluntary busing, risks the health of the children and impinges on the educational process.

5. The Board of Education of the City of Chicago has consciously failed to implement the goals and purposes of the convenated [sic] program and its ultimate goal of increasing desegregation of

faculties and students through quality education and willing integration. For example, the Board has disregarded the development of curricula of unusual quality which would serve all parts of the community, including nonpublic schools, and which would attract white families who are sending children to parochial schools and induce them to remain in the City. The Board has also placed in position of authority administrators and a principal who do not support and work against the principle of voluntary integration.

6. The failure to implement the goals and purposes covenated [sic] with the Federal government is reflected in the disharmonious and inconsistent approaches taken by a staff ignorant of or insensitive to the goals of Walt Disney Magnet School, most particularly in the Approach [sic] to

team teaching and in the need for a creative individualized curriculum. New teachers have been brought into the school with no inservicing to help them understand and adjust to the unique environment at Disney.

7. The defendants have adopted a policy which permits racial and socio-economic imbalance in the student population.

8. Because of the deliberate policies of the Board of Education of the City of Chicago, and its administrators, frustrating the goal of voluntary integration of teachers and students through voluntary busing and quality education, the school applications have declined from 2500 in 1979 to 1200 in 1980. During the period from November, 1978 to December, 1979 (prior to any Board cuts) more than 18 certified

teachers resigned or transferred from the school) [sic].

9. The present school administration have [sic] undermined effective team teaching by transferring teachers from one instructional area within the school to another area, and from one established team of teachers to another, for no apparent educational reason. Some of these teachers have filed their own individual complaints with the Equal Employment Opportunity Commission, and one teacher has already won her suit.

10. The original program of parent and community participation and input is not being implemented. The Board of Education of the City of Chicago and the Principal of Walt Disney Magnet School consistently reject recommendations made by committees of the Walt Disney School Council that would

increase integration. In 1980 there existed a list of 150 parent volunteers for the first floor. These parents were never contacted by the school, and the Council's request to be included in administrative planning and decision-making were [sic] denied. The School Community Coordinator position, which existed for 10 years and which as a CETA position after 1975, was allowed to lapse when the principal failed to refill the vacancy with a new CETA worker.

11. An important concept in the original specifications was the involvement of Northwestern University in teacher selection and training, and in curriculum development. This once-strong relationship, in existence for seven years, has been all but severed by the present administration.

12. The Board of Education of the City of Chicago deliberately and drastically cut the Communication Arts Center staff by two-thirds. The Center does not serve not only the Disney student population but also it has failed completely to serve the entire public school system. Further, the Board has completely failed to implement the original plan to have this facility service the non-school community as well.

13. The Board eliminated 57% of all school clerks and all the teacher aides.

XIII

A further example of the Board's discrimination is the elimination of the Shared Facilities Program designed for the enrichment of children of all races in the [sic] art, music, science, reading and library which would make attractive to the parents, particularly white parents, to

register their children [sic]. This program has been cut by 45%.

XIV

The key to success at Walt Disney Magnet School is the fact that parents will choose voluntarily to send their children to a school of the highest quality, integrated by design. Also important is the input from parents and from the University community. The Board of Education of the City of Chicago, its Administration and the Principal of Walt Disney Magnet School have chosen intentionally not to implement the program and plan covenanted as the basis to obtain voluntary desegregation. The result is that neither white, nor minority children, nor the society at large have the benefit of a quality integrated education.

XV

The acts and omissions of defendants as alleged in this complaint have denied, and will continue to deny to plaintiffs their right to equality in public education without regard to race and to freedom from discrimination in the operation of Walt Disney Magnet School, a public school. By reason of said acts and omissions, and particularly by reason of the breach of the covenants entered by defendants and the breach of the public trust, the rights of plaintiffs and the classes they represent, protected under the Fourteenth Amendment to the United States Constitution and by Title 42, United States Code, Sections 1981, 1983, 2000c and 2000d, have suffered and will continue to suffer irreparable injury. Plaintiffs and the classes they represent

have no adequate remedy at law to redress the grievances herein set forth.

XVI

Defendants will continue to engage in such discrimination against plaintiffs unless enjoined by an order of this court..

WHEREFORE, plaintiffs demand judgment:

1. Declaring that defendants have been and are carrying on a particular school known as Walt Disney Magnet School as a racially discriminatory school within the City of Chicago, State of Illinois in violation of Title 42, United States Code, Section [sic] 1981, 1983, 2000c, 2000d and the Fourteenth Amendment of the United States Constitution, and the covenants, conditiion [sic] subsequent, and restrictions contained in the Quitclaim deed [sic] dated March 24, 1968 by and between

the United States of America, grantor and the City of Chicago, a Municipal Corporation of the State of Illinois and the Board of Education of the City of Chicago, quitclaiming the land situated at 4141 North Clarendon Avenue, Chicago, Illinois in trust for public education purposes.

2. Entering a preliminary and permanent injunction enjoining defendants from:

a. Continuing to exclude participation of minor children in Walt Disney Magnet School to which they previously applied and were accepted, on the basis of race;

b. Continuing to operate the Walt Disney Magnet School on a racially discriminatory basis;

3. Setting a prompt hearing wherein the defendants shall show cause why they, and those in active concert or participation

with them, should not be enjoined during the pendency of this action from continuing their denial of readmission to the minor plaintiffs, and from continuing such exclusion or threats thereof.

4. Ordering defendants to immediately promulgate detailed procedures to implement the covenants, plan and program contained in the proposal, Leggett report, and implementing reports, and ordering defendants to implement said procedures immediately, and to promulgate detailed procedures for hearings in compliance with procedural due process guarantees prior to the exclusion of accepted applicants or new applicants on the basis of race.

5. Awarding plaintiffs the reasonable costs and expenses of this action, including attorney fees; and

6. Granting plaintiffs such other and further relief as may be just.

DATED: September 7, 1981

Yvon D. Roustan
Attorney for Plaintiffs
1527 N. Ashland Avenue
Chicago, Illinois 60622
312/227-4944

EXHIBITS ATTACHED TO THE FIRST AMENDED COMPLAINT ARE NOT REPRINTED HERE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| RICHARDS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | No. 80 C 4261 |
| | ) | |
| v. | ) | |
| | ) | |
| BYRNE, et al., | ) | |
| | ) | |
| Defendants. | ) | |

Memorandum Opinion and Order

Susan Getzendanner
United States District Judge

The plaintiffs have moved for a temporary restraining order requiring the admission of approximately 85 children to the pre-kindergarten and kindergarten classes at Walt Disney Magnet School in Chicago. These children, substantially all of whom are white, were accepted for admission to Walt Disney Magnet School in

June of 1981 and that acceptance was revoked by letter in August of 1981.

After several hours of hearings, the following basic facts are undisputed: The plaintiffs are the parents of certain 3-6 year old children who were first accepted for enrollment at Walt Disney Magnet School and then rejected. They have sued on their own behalf and on behalf of the parents of other children similarly situated. Walt Disney Magnet School is the only voluntary integrated school in Chicago with a pre-kindergarten program. There is a racial, socio-economic quota system for the School. The original quotas, set several years ago, continued in use until the summer of 1981 when the quotas for children in the 3-6 year age group were changed by the Board of Education.

There are many more applicants than spaces available at the School. Being accepted for enrollment at the School is considered very important by the parents of the accepted children. The children are selected by a computer based on information concerning each applicant. The information primarily relates to the race, age, sex, and parents' educational background of each child.

In March of 1981 applicants were received by the Board of Education for the 1981-82 school year. Applicants in the 3 to 6 year age group were selected by the computer in accordance with the then existing racial and socio-economic quota. In June of 1981 letters of acceptance were mailed to the accepted children.

Sometime during the summer, the racial quotas for the School were changed. Several

reasons were advanced for the change, including a need to correct the quotas to reflect the racial make-up of the 7 Districts from which the School draws its students, and a need to "look good" to the federal government in connection with the Board's desegregation efforts. In any event, the quota for white children was lowered about 10% and the various quotas for categories of non-white children, such as Indians, Orientals, and Puerto Ricans, were increased in the aggregate about 10%. It was thus necessary to revoke the acceptances of about 85 white children. How the unlucky 85 were selected was not the subject of testimony. However, counsel for the Board stated that it was his belief that the original computer list of applicants was used and that the children in the various racial and socio-economic groups who were at

the bottom on the list were the ones whose acceptances were revoked.

In August letters were sent to the parents of the 85 children informing them that their children were rejected because of the change in the quotas. (Some of the parents did not receive notice of the revocation of acceptance until the day they appeared at the School for enrollment.) Presumably an equal number of non-white children were similarly advised of their acceptance.

Children in the 3-6 year age group are presently being enrolled at the School. The children are "phased in" 20 a week over a number of weeks beginning early in September. Due to a number of children in this age group who failed to appear for enrollment or who failed to return to school this fall, there are some vacant places in

the classes for the 3-6 year olds, but there are substantially fewer than 85 vacancies.

Plaintiffs claim first that they have been discriminated against solely on the basis of their race (white) and second that they have been deprived of their entitlement to attend Walt Disney Magnet School without due process of law. With respect to the first claim, at the outset of these proceedings the court inquired of plaintiffs' counsel whether the plaintiffs were attacking the Disney racial quota system. Counsel assured the court that his clients objected not to the quotas per se, but rather to the fact that they had been forced to bear the brunt of the quota's revision.* Based on

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* At the conclusion of the proceedings several days later, plaintiffs' counsel informed the court that the plaintiffs were now prepared to attack the quotas because they were not satisfied with the relief which the court informed them

(continued...)

this representation, the court informed the parties that the temporary restraining order hearing would be limited to the entitlement question, for by forsaking an across-the-board challenge to the quotas, plaintiffs had essentially conceded that a race-conscious admission system was proper at Disney. Racial quotas by definition discriminate on the basis of race. See generally Regents of University of California v. Bakke, 438 U.S. 265 (1978) (opinion of Powell, J.). Those who accept the concept of quotas have thus little

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*(...continued)
could be granted on their entitlement claim, namely, a due process hearing to be provided by the Board of Education. The court advised plaintiffs' counsel to file an appropriate amended pleading and a new motion for temporary relief.

ground for complaint when racially-based exclusions materialize.*

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* Plaintiffs could of course argue that though racial quotas are permissible in principle at Disney, the current numbers remain objectionable on the ground that they have been set arbitrarily and capriciously. Indeed the evidence adduced at the temporary restraining order hearings indicates that such a claim might have some merit. The Board of Education's stated policy with respect to Disney is that the school's racial percentages should reflect the demographic breakdown of all school-age children living in the attendance area served by the school. See Exhibit 4A to the First Amended Complaint. However, as related by counsel for the Board, the current quotas were determined by a simple analysis of the racial composition of the five-year-old class enrolled last year in the area's public schools. Given the substantial parochial and private school enrollment of white children in the affected region, the Board's choice of statistics naturally understates what the white quota "should be." Any argument based on these facts, however, is basically a claim that state administrative officials have failed to follow their own internal guidelines. So viewed, federal jurisdiction over this line of argument is doubtful at best. If these claims are to be made, they should be

(continued...)

With respect to the entitlement question, the uncontroverted testimony was that in the history of the Walt Disney Magnet School all children who were accepted for enrollment were entitled to attend the School until they moved out of the 7-District area served by the School or left

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*(...continued)
initially addressed to the school officials who will conduct the due process hearing described infra.

This is not to say that there are no federal grounds upon which quota sympathizers can challenge the particularities of a given allotment of spaces. Cf. Fullilove v. Klutznick, 100 S.Ct. 2758 (1980) (opinion of Burger, C.J.) (Congressional racial quota for disbursement of federal funds upheld against Constitutional challenge; fact that quota was "limited" mentioned repeatedly); United Steelworkers v. Weber, 99 S.Ct. 2721, 2730 (1979) (in upholding a voluntary affirmative action program against Title VII attack, the Court stressed those limiting aspects of the challenged plan which made it "permissible").

voluntarily.* Presumably, eighth grade graduation and expulsion are other means of leaving the school. In view of this past, see generally Perry v. Sinderman, 408 U.S. 593 (1972), and in view of the unique nature of the school and its pre-kindergarten program, the right to attend the school must be viewed as a substantial property right which should not be taken away without due process. No such process has yet been provided. None of the parents of the children whose acceptances have been revoked by the Board of Education were ever given any opportunity to be heard or to ask questions concerning the reasons for the change in the quotas and the process by

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* Despite numerous opportunities, the Board of Education did not present any witnesses on the entitlement issue. The Board of course remains free to present what evidence it has before a preliminary injunction is entered or a final decision is made by the court.

which their children were selected for revocation.

Should the plaintiffs ultimately prevail on the entitlement issue, the only relief which the court can grant is an order directing the Board of Education to provide the parents with a due process hearing. Such an order would not require the Board of Education to change the quotas back to what they were in 1980 and it would not require the Board of Education to enroll the children in the class at the School. All this court can do is require the hearing--not determine its outcome. If despite listening to the plaintiffs' arguments, the Board of Education persists in adhering to the new quotas, then the children in the class before this court will not be entitled to admission at the School.

Therefore, the temporary relief which the plaintiffs are seeking -- admission to the School until a preliminary injunction hearing or a final decision by this court-- goes well beyond what this court can finally order. Also, there is no room for 85 more children at the School and it is generally undesirable to dislocate the children in the class and the children now enrolled at the School for a short period of time. For these reasons, the court informed the parties that if the Board of Education provided a prompt hearing, the court would not order the temporary admission of the children to the School.

The Board of Education's attorney has in turn informed the court that a hearing will be provided by the Board of Education on October 20th for all of the parents whose children were accepted and later rejected.

The court has discussed with the parties a proposed agenda for the hearing and a revised agenda complying with the suggestions made by the court is to be provided to the court by the Board of Education.*

The proposed hearing is the ultimate relief which this court can order. In view

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* The court presently is of the opinion that the revised agenda for the hearing would result in a hearing that would meet minimal due process requirements under the facts and circumstances of the case, but plaintiffs are free to challenge the adequacy of the hearing on due process grounds after the hearing takes place. The court did not require a court reporter to be present, and in fact prohibited a court reporter from being present, because the plaintiffs' attorney stated that what happens at the hearing will be "evidence" in this case. In addition to representing the class, the plaintiffs' attorney is representing other plaintiffs concerning various other Walt Disney Magnet School issues in a broad civil rights action. The hearing afforded parents of 3-6 year olds would be severely impaired if the hearing were turned into a search for evidence in what is essentially a different case.

of the action voluntarily being taken by the Board of Education, and the promptness with which it is being taken, this court is persuaded that the temporary restraining order sought by the plaintiffs should be denied. It is not possible to grant the temporary admission of the children into the School without materially disrupting the School and the lives of the affected children. Therefore, even though the plaintiffs have established a likelihood of success on the merits of the entitlement issue, a balancing of the hardships and of the equities, taking into account the Board's voluntary action in providing the

hearing on October 20th, requires that the temporary restraining order be denied.

Susan Getzendanner
United States District Judge

DATED: October 13, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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|---|---|---|
| BOTTICH et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. 80 C 4261 |
| BYRNE, et al. | ) | (Filed [no date]) |
| Defendants. | ) | |

SECOND AMENDED COMPLAINT

COUNT I

Plaintiffs allege:

I

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343, 2201, 2202 and Section 1706 of Title 20 [sic] United States Code. This is an action in equity seeking relief under Title 42, United States Code, Section [sic] 1981 and 1983. The rights sought to be protected are secured by the

First, Fifth and Fourteenth Amendment [sic] of the United States Constitution and by Title 42, United States Code, Sections 1981, 1983, and by Section 1703 of Title 20, United States Code, providing for freedom of association, due process, equal rights, equal educational opportunity, and for the protection of Civil Rights.

II

This is a class action brought by the adult plaintiffs on behalf of themselves and their children or wards and on behalf of other adults and minors similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. Members of the class are white taxpayers citizens who reside in the County of Cook, State of Illinois, within the boundaries of the Walt Disney Magnet attendance district. All the members of the class are similarly situated and

differentially affected by the action of defendants. The class is so numerous that joinder of all members is impracticable. There are questions of both law and fact common to the class, and the claims of the named plaintiffs are typical of the class. The named plaintiffs will adequately represent all members of the class.

III

Plaintiffs are minor white chldren aged 3, 4 and 5 and each plaintiff is suing by his or her next friend, pursuant to Rule 17(c) of the Federal Rules of Civil Procedure. In each case, the next friend identified in the caption of this action is the parent, guardian or person otherwise interested in and responsible for the welfare of the minor on whose behalf he or she brings this action. Each plaintiff was accepted for admission to Walt Disney Magnet

School in June 1981 and said acceptance was revoked either by letter or orally during the period between August and September, 1981.

IV

Defendant JANE BYRNE is the mayor of Defendant City of Chicago, grantee of the quitclaim deed attached to the original Complaint as Exhibit 1 and made a part hereof. Defendant, BOARD OF EDUCATION OF THE CITY OF CHICAGO, is duly authorized by the law of the State of Illinois and is charged thereby with the duty of establishing, maintaining, and operating the Chicago School System and the Walt Disney Magnet School; Defendants RAUL VILLALOBOS, KENNETH SMITH, SOL BRANDZEL, LUIS SALCES, EDWIN CLAUDIO, ROSEMARY JANUS, MARTHA JANTHO, REV. WILFRED REID, BETTY BONOW, JOHN

D. FOSTER, are members of the Board of Education of the City of Chicago.

V

Defendant DR. RUTH LOVE is the present Superintendent of Schools of the Chicago School District. She holds office pursuant to the laws of the State of Illinois and performs her duties under the authority and control of Defendant Board of Education of the City of Chicago. Defendant DR. ANGELINE CARUSO is the past Acting Superintendent of Schools of the Chicago School District.

VI

Defendant, MR. HOWARD M. SLOAN, is District 2 Superintendent, Defendant DR. HARRY C. SPRINGS, is Associate Superintendent, Office of Equal Educational Opportunity, Board of Education, City of Chicago. Defendant, DR. ROBERT GALLAGHER, is Past Principal of Walt Disney Magnet

School. Defendant, JOHN J. BEAN, is the current Interim-Principal of Walt Disney Magnet School, a public school of the City of Chicago.

VII

Plaintiffs allege that on October 31, 1980, Walt Disney School had approximately 1743 pupils in all grades, of whom about 31.7% were of the black race, 44.3% were of the white race, 17.6% were of the Hispanic race, and 6.3% were of other races. Plaintiffs allege that on October 31, 1980 Walt Disney Magnet School employed 112 of other minority ethnic [sic] or racial backgrounds. There are 5 teacher aids, 2 being white, 0 being black, and 3 being of other minority ethnic [sic] or racial backgrounds.

VIII

On August 17, 1981 and thereafter, defendants SLOAN and SPRINGS mailed letters to approximately 85 Kindergarten and pre-Kindergarten white children, revoking their June, 1981 acceptance for admission to Walt Disney Magnet School, a public school in the City of Chicago. The purported reasons given by the Board were the implementation of Board Report #73-267-15 at Walt Disney Magnet School, a copy of which is attached to the First Amended Complaint as Exhibit 4A, the change of racial quotas in the school attendance area, and a need to "look good" to the Federal Government in connection with the Board's desegregation efforts. The quota for white children was lowered about 10% and the quota for minority children was increased in the aggregate about 10%. As a result the prior acceptance

of about 85 white minor children was revoked.

IX

Walt Disney Magnet School is by definition a "Stably Integrated School"; that is, a school with an enrollment of 30-70% white or 30-70% minority, and with some history of stability or has become stable. (The Board has entered into a consent decree adopting a Student Desegregation Plan [hereinafter called "PLAN"] for the Chicago Public Schools, adopted April 15, 1981; Part II of said PLAN at page 3 defined a "Stably Integrated School" as a school with 30-70% white or 30-70% minority). The Board of Education will implement magnet schools in general to ensure that their racial/ethnic composition achieves integration/ desegregation at a level of 15-35% white by September 1982 with respect to entering

grades, to the extent the goal can be achieved without excluding students presently enrolled. (See PLAN part II, pages 5 and 6). Kindergarten children shall be omitted from mandatory reassignments (See PLAN page 10) and mandatory reassignment and transportation shall be used only if other techniques prove to be insufficient to meet the objective of providing for the greatest practicable number of stably desegregated schools. The Comprehensive Student Assignment Plan will include a contingency plan which may provide a reasonable period of time, not to exceed June 1983 to determine the extent to which other voluntary techniques have succeeded or promise to succeed in achieving the objectives of the Consent Decree. (See PLAN, part II, pages 8 and 9).

The Board of Education will create, preserve and exempt from mandatory reassignment, schools identified as stably integrated (see PLAN, part II, page 3). Thus, Walt Disney Magnet School is exempt from mandatory reassignment of children from one public school to another.

X

The Board's action in rejecting the accepted minor plaintiffs and in lowering the racial quota for whites is arbitrary and capricious and unlawfully discriminates between white and minority students, including plaintiffs, solely on account of their race, in that:

A. Only white students are stigmatized on account of their race by the aforesaid unlawful discrimination.

B. Only accepted white students are subjected to the uncertainty as to

their future plans as a result of the lowering of the white quotas in apparent proportion to the increase in segregated student bodies in the Chicago public schools attendance area for Walt Disney Magnet School.

C. Only white students are totally denied the right to attend a voluntarily integrated school equal to or better than their former school. Said white students were not provided and to this date have not been provided with any other equivalent alternative.

D. Only white students were denied the right to attend an integrated magnet school although they desired to do so and having been accepted were entitled to do so until graduation, expulsion or voluntary

transfer out. (See Count II and the opinion of the Honorable Judge Susan Getzendanner attached hereto as Appendix A).

E. The action of the Board contributes to the flight of white children to private, parochial, and suburban schools in direct contradiction with the stated goals of Walt Disney Magnet School. (See Exhibit 4A, and generally Exhibits 1, 2, 3, 4, 4B, attached to the original complaint and made a part hereof), and deprives both white and minority [sic] of the benefits of voluntary integration and interracial association.

F. The racial quotas currently in application were determined by Board administrators by a simple

analysis of the racial composition of the five-year-old class enrolled in 1980 in the attendance area's public schools without considering the substantial parochial and private school enrollment of white children in the affected region and the actual population of 3, 4 and 5-year old white children according to Census figures; nor were parents nor the community at large ever consulted in direct contradiction with the manner in which racial quotas were applied in the past.

XI

The Board's action unlawfully discriminates between white and minority students at Walt Disney Magnet School. Upon information and belief, plaintiffs state

that there is sufficient vacancy at Walt Disney Magnet School for 85 more children and that such vacancies are being filled out by children on the "waiting list" other than the rejected plaintiffs. Plaintiffs allege that Walt Disney is not an overcrowded school and is, in fact, underutilized both in its capacity for students and staff and in the physical spaces available.

XII

Unless this Court enjoins defendants from forcing or effectuating the Board's rejection and implementing the racial quotas, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court enter an order:

1. Declaring the action of the Board rejecting 85 white accepted children and

implementing the impermissible racial quotas and any other orders, rules, or regulations adopted pursuant thereto to be unconstitutional and null and void;

2. Preliminary and permanently enjoining defendants and their successors, agents, and employees, from enforcing or attempting to effectuate the aforesaid rejections, from denying white students admission to Walt Disney Magnet School solely on account of their race, and from taking any further steps to dissuade white students solely on account of their race from applying to Walt Disney Magnet School.

3. Awarding plaintiffs the reasonable costs and expenses of this action, including attorneys fees, compensatory damage sufficient to cover actual expenses and the cost of a private or parochial education for each child who is not reinstated and

transferred out, and exemplary damages in the sum of $75,000 for each excluded child.

4. Granting plaintiffs such other and further relief as may be deemed just.

COUNT II

I

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343 and Section 1706 of Title 20, United States Code. The rights sought to be protected are secured by the First, Fifth and the Fourteenth Amendment of the United States Constitution, by Title 42, United States Code, Section [sic] 1981, 1983, 2000c and 2000d, and the covenants, conditions subsequent, and restrictions contained in the Quitclaim Deed dated March 24, 1968, attached to the original complaint as Exhibit 1 and made a part hereof, by and

between the United States of America, Grantor, and the City of Chicago, a Municipal Corporation of the STate [sic] of Illinois and the Board of Education of the City of Chicago, a body politic and corporate and an agency of the State of Illinois, organized and existing under Illinois Revised Statutes Chapter 122, Section 34-2, which may be sued as such, quitclaiming a tract of land situated at 4141 North Clarendon Avenue, Chicago, Illinois, in trust for public education purposes, and the entitlement granted by the Constitution and the laws of the State of Illinois and the regulations, rules, orders and contracts adopted pursuant thereto. (See generally October 1981 opinion of the Honorable Judge Susan Getzendanner recognizing the entitlement and substantial

property right of plaintiffs, attached hereto as Appendix A.).

II THROUGH XI

The allegations of paragraphs II through XI of Count I of this Complaint are incorporated herein by reference as paragraphs II through XI of this Count II.

XII

On March 24, 1968, defendants CITY OF CHICAGO and THE BOARD OF EDUCATION OF THE CITY OF CHICAGO covenanted to utilize continuously the property described in Exhibit I hereto attached, for public educational purposes in accordance with a proposed program and plan as set forth in the application of the City of Chicago to the Department of Health, Education and Welfare dated September 14, 1967, attached hereto as Exhibit 2 and made a part hereof, and its resolution adopted January 10, 1968,

attached hereto as Exhibit 3, and as further effected by a later program and plan entitled "Final Educational Specification" dated March, 1969, commonly known as the Leggett report, attached hereto and made a part hereof as Exhibit 4; the Chicago Board of Education Board Report No. 73-267-15, dated March 28, 1973 attached hereto and made a part hereof as Exhibit 4A regarding pupil enrollment policy, and the Racial, Ethnic Survey of Students in Area C (Districts 1-7). See Summary of Racial/Ethnic Survey by District, dated 10/31/80, attached hereto and made a part hereto as Exhibit 4B.

XIII

By the terms of said quitclaim deed dated March 24, 1968, (Exhibit 1), defendant CITY OF CHICAGO or the BOARD OF EDUCATION OF

THE CITY OF CHICAGO, covenanted, inter alia, as a condition subsequent to the grant of said land, to comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare, 45 CFR Part 80 issued pursuant to that title and as in effect on the date of the said quitclaim deed, to the end that, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the program and plan referred to in paragraph XII of this complaint or under any other program or activity of the City of Chiago [sic] or the Board of Education of the City of Chicago, its successors or assigns, to which said Title VI and said

Regulations apply by reason of the covenants heretofore referred. Exhibits 4A and 4B.

XIV

The rejections cited in paragraph VIII of this complaint constitute a breach of the covenants, conditions subsequent and restrictions contained in the Quitclaim Deed and implementing resolutions, programs and plans described in exhibits 1 through 4A. Said rejections are part of a series of breaches and acts of selective mismanagement which encourage "white flight." Such acts were fully stated in the original complaint and are here restated (with some modification) as follows:

1. On or about March, 1980 the Board of Education of the City of Chicago laid-off a total of 34 teachers, 46 bus aides and 1 teacher aide from Walt Disney Magnet School, more than any other elementary school within

the City of Chicago, and further cuts are programmed in the very near future. By virtue of said cuts in personnel the Board of Education of the City of Chicago has deliberately made it impossible to comply with the conditions set forth in the quitclaim deed, Exhibit 1 hereto, and has breached and continues to breach said conditions and the agreed program and plan and the requirements of Title VI of the Civil Rights Act of 1964.

2. Racial consideration entered into the Board's January, 1980 decision to terminate 34 teachers from Walt Disney Magnet School in that disproportionate number [sic] of minority teachers were terminated, thereby creating discriminatory racial imbalance in the school faculty, and in that said terminations with full knowledge of the Board of Education of the

City of Chicago and its Administration impede the purpose of voluntary integration of Walt Disney Magnet School.

3. The pupil-teacher ratio is 22 to 1, higher than recommended by the plan and program and inconsistent with the goal and design of the school which utilizes open classrooms. This is particularly true for the Early Childhood Center, which deals with 3 to 6 year old children and lost more than 50% of its staff. This has resulted in lack of discipline, loss of individualized instruction, and increased noise level and has greatly reduced meaningful teaching and communication. The atmosphere and environment created, frightening to young children, is hardly conducive to voluntary integration and understanding among children and faculty of various races.

4. Because the January, 1980 cuts eliminated all attendants in the buses and left the driver alone to supervise each busload of children while driving in rush hour traffic, both white and minority parents have withdrawn or are seriously considering withdrawing their children from the school. This has contributed to the so-called "white flight" to the suburbs and the parochial schools and thus undermines voluntary integration, voluntary busing, risks the health of the children and impinges on the educational process.

5. The Board of Education of the City of Chicago has consciously failed to implement the goals and purposes of the covenated [sic] program and its ultimate goal of increasing desegregation of faculties and students through quality education and willing integration. For

example, the Board has disregarded the development of curricula of unusual quality which would serve all parts of the community, including nonpublic schools, and which would attract white families who are sending children to parochial schools and induce them to remain in the City. The Board has also placed in position of authority administrators and a principal who do not support and work against the principle of voluntary integration.

6. The failure to implement the goals and purposes covenated [sic] with the Federal Government is reflected in the disharmonious and inconsistent approaches taken by a staff ignorant of or insensitive to the goals of Walt Disney Magnet School, most particularly in the approach to team teaching and in the need for a creative individualized curriculum. New teachers

have been brought into the school with no inservicing to help them understand and adjust to the unique environment at Disney.

7. The defendants have adopted a policy which permits racial and socio-economic imbalance in the student population.

8. Because of the deliberate policies of the Board of Education of the City of Chicago and its administrators, frustrating the goal of voluntary integration of teachers and students through voluntary busing and quality education, the school applications have declined from 2,500 in 1979 to 1,200 in 1980. During the period from November, 1978 to December, 1979 (prior to any Board cuts) more than 18 certified teachers resigned or transferred from the school).

9. The present school administration have [sic] undermined effective team

teaching by transferring teachers from one instructional area within the school to another area, and from one established team of teachers to another, for no apparent eduational [sic] reason. Some of these teachers have filed their own individual complaints with the Equal Employment Opportunity Commission, and one teacher has already won her suit.

10. The original program of parent and community participation and input is not being implemented. The Board of Education of the City of Chicago and the Principal of Walt Disney Magnet School consistently reject recommendations made by committees of the Walt Disney School Council that would increase integration. In 1980 there existed a list of 150 parent volunteers for the first floor. These parents were never contacted by the school, and the Council's

request to be included in administrative planning and decision-making were [sic] denied. The School Community Coordinator position, which existed for 10 years and which as a CETA position after 1975, was allowed to lapse when the principal failed to refill the vacancy with a new CETA worker [sic].

11. An important concept in the original specifications was the involvement of Northwestern University in teacher selection and training, and in curriculum development. This once-strong relationship, in existence for seven years, has been all but severed by the present administration.

12. The Board of Education of the City of Chicago deliberately and drastically cut the Communication Arts Center staff by two thirds. The Center does not serve not only [sic] the Disney student population but also

it has failed completely to serve the entire public school system. Further, the Board has completely failed to implement the original plan to have this facility service the non-school community as well.

13. The Board eliminated 57% of all school clerks and all the teacher aides.

XV

A further example of the Board's discrimination and selective mismanagement is the elimination of the Shared Facilities Program designed for the enrichment of children of all races in the [sic] art, music, science, reading and library which would make [sic] attractive to the parents, particularly white parents, to register their children. This program has ben [sic] cut by 45%.

XVI

The key to success at Walt Disney Magnet School is the fact that parents will choose voluntarily to send their children to a school of the highest quality, integrated by design. Also important is the input from parents and from the University community. The Board of Education of the City of Chicago, its Administration and the Principal of Walt Disney Magnet School have chosen not to implement the program and plan covenanted as the basis to obtain voluntary desegregation. The result is that neither white nor minority children nor the society at large have the benefit of a quality integrated education.

XVII

The acts and omissions of defendants as alleged in this complaint have denied and will continue to deny to plaintiffs their

right to equality in public education without regard to race and to freedom from discrimination in the operation of Walt Disney Magnet School, a public school. By reason of said acts and omissions, and particularly by reason of the breach of the covenants entered by defendants and the breach of the public trust, the rights of plaintiffs and the classes they represent, protected under the First, Fifth and the Fourteenth Amendment to the United States Constitution and by Title 42, United States Code, Section [sic] 1981, 1983, 2000c and 2000d and the entitlement granted by the Constitution, laws, ordinances and regulations of the State of Illinois, and the rules, orders, regulations and contracts adopted pursuant thereto, have suffered and will continue to suffer irreparable injury.

XVIII

In reliance upon the aforesaid covenant, conditions subsequent, and restrictions contained in the Quitclaim Deed (Exhibit 1) and the programs, plan, resolutions, Leget report, Board report (Exhibits 2, 3, 4 and 4A) and in the exercise of their First Amendment right of Freedom of Association under the United States Constitution, and the entitlement to a public education granted by the Constituti-n [sic] and the laws of the State of Illinois and the ordinances, orders, rules, regulations and contracts adopted pursuant thereto, protected by the due process clause of the Fourteenth Amendment of the United States Constitution, plaintiffs applied for admission to Walt Disney Magnet School and on [sic] June 1981 were accepted. And in reliance of said acceptance they made plans

and cancelled other plans, incurred expenses of time and of money, and submitted themselves to all kinds of physical, mental, dental and medical examinations and suffered all types of inconvenience and detriment.

XIX

As a result of defendants' breach of covenant, most plaintiffs have been unable to attend any school or have been placed, at great personal expenses to their parents, in private or parochial schools, and have lost the benefit of a high quality integrated public education and the benefits deriving from interracial association in a pluralistic society, all to their irreparable injury. Plaintiffs have suffered actual damages equal to their out-of-pocket expenses and lost time plus the cost of a private or parochial school wherever

applicable, and exemplary damages in the sum of $75,000 for each excluded child.

WHEREFORE, plaintiffs demand judgment against defendants for specific performance of the covenants, plans and programs contained in the proposal, Legget report and implementing reports and reinstatement into Walt Disney Magnet School plus judgment in the amount of actual damages incurred plus exemplary damages in the sum of $75,000.00 for each excluded child, plus costs, expenses, and reasonable attorney's fees.

DATED: October 13, 1981

Yvon D. Roustan,
Attorney for Plaintiffs
1527 N. Ashland Avenue
Chicago, Illinois 60622
312/227-4944

EXHIBITS ATTACHED TO THE
SECOND AMENDED COMPLAINT
ARE NOT REPRINTED HERE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| BOTTICH, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | No. 80 C 4261 |
| | ) | |
| BYRNE, et al., | ) | (Filed November |
| | ) | 25, 1981) |
| Defendants. | ) | |

THIRD AMENDED COMPLAINT

COUNT I

Plaintiffs allege:

I

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343, 2201, 2202 and Section 1706 of Title 20 United States Code. This is an action in equity seeking relief under Title 42, United States Code, Section [sic] 1981 and 1983. The rights sought to be protected are secured by the First, Fifth

and Fourteenth Amendment [sic] of the United States Constitution and by Title 42, United States Code, Sections 1981, 1982, 1983, 2000c, 2000d and by Section 1703 of Title 20, United States Code, providing for freedom of association, due process, equal rights, equal educational opportunity, and for the protection of Civil Rights.

II

This is a class action brought by the adult plaintiffs on behalf of themselves and their children or wards and on behalf of other adults and minors similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Member [sic] of the class are Cuban, American-Indians, and white taxpayers citizens who reside in the County of Cook, State of Illinois, within the boundaries of the Walt Disney Magnet School attendance area. All members of the class

are similarly situated and differentially affected by the action of the defendants. The class is so numerous that joinder of all members is impracticable. There are questions of both law and fact common to the class, and the claims of the named plaintiffs are typical of the class. The named plaintiffs will adequately represent all members of the class.

III

Plaintiffs are minor Cuban, American-Indians, and white chldren aged 3, 4, 5, and 6 and each plaintiff is suing by his or her next friend, pursuant to Rule 17(c) of the Federal Rules of Civil Procedure. In each case, the next friend identified in the caption of this action is the parent, guardian or person othherwise [sic] interested in and responsible for the welfare of the minor on whose behalf he or

she brings this action. Each plaintiff was accepted for admission to Walt Disney Magnet School in June 1981 and said acceptance was revoked either by letter or orally during the period between August and September, 1981.

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Defendant JANE BYRNE is the mayor of Defendant CITY OF CHICAGO, grantee of the quitclaim deed attached to the original Complaint as Exhibit I and made a part hereof. Defendant, BOARD OF EDUCATION OF THE CITY OF CHICAGO, is duly authorized by the law of the State of Illinois and is charged thereby with the duty of establishing, maintaining, and operating the Chicago School system and the Walt Disney Magnet School; Defendants RAUL VILLALOBOS, KENNETH SMITH, SOL BRANDZEL, LUIS SALCES, EDWIN CLAUDIO, ROSEMARY JANUS, MARTHA

JANTHO, REV. WILFRED REID, BETTY BONOW, JOHN D. FOSTER, are members of the Board of Education of the City of Chicago.

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Defendant, MR. HOWARD M. SLOAN, is District 2 Superintendent, Defendant DR. HARRY C. SPRINGS, is Associate Superintendent, Office of Equal Educational Opportunity, Board of Education, City of

Chicago. Defendant, DR. ROBERT GALLAGHER, is Past Principal of Walt Disney Magnet School. Defendant, JOHN J. BEAN, is the current Interim-Principal of Walt Disney Magnet School, a public school of the City of Chicago.

VII

Plaintiffs allege that on October 31, 1980, Walt Disney School had approximately 1743 pupils in all grades, of whom about 31.7% were of the black race, 44.3% were of the white race, 17.6% were of the Hispanic race, and 6.3% were of other races. Plaintiffs allege that on October 31, 1980 Walt Disney Magnet School employed 112 teachers of various other minority ethnic [sic] or racial backgrounds. There are 5 teacher aids; 2 being white, 0 being black, and 3 being of other minority wthnic [sic] or racial backgrounds.

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On August 17, 1981 and thereafter, defendants SLOAN and SPRINGS mailed letters to approximately 85 Kindergarten and pre-Kindergarten Cuban, American-Indian and white children, revoking their June, 1981 acceptance for admission to Walt Disney Magnet School, a public school in the City of Chicago, [sic] The purported reasons given by the Board were the implementation of Board Report #73-267-15, a copy of which is attached to the First Amended Complaint as Exhibit 4A, the change of racial quotas in the school attendance area, and a need to "look good" the Federal Government in connection with the Board's desegregation efforts. The quota for white children was lowered about 10% and the quota for minority children was increased in the aggregate about 10%. The quota for Cuban and

American-Indians was lowered about 3% and the quota of Mexican and Puerto Rican children was increased by the same amount. As a result the prior acceptance of about 85 Cuban, American-Indians and white minor children was revoked.

IX

Walt Disney Magnet School is by definition a "Stably Integrated School"; that is, a school with an enrollment of 30-70% white or 30-70% minority, and with some history of stability or has become stable. (The Board has entered into a consent decree adopting a Student Desegregation Plan [hereinafter called "PLAN"] for the Chicago Public Schools, adopted April 15, 1981; Part II of said PLAN at page 3 defined a "Stably Integrated School" as a school with 30-70% white or 30-70% minority). The Board of Education will implement magnet schools in

general to ensure that their racial/ethnic composition achieves integration/ desegregation at a level of 15-35% white by September 1982 with respect to entering grades, to the extent the goal can be achieved without excluding students presently enrolled. (See PLAN part II, pages 5 and 6). Kindergarten children shall be omitted from mandatory reassignments (See PLAN page 10) and mandatory reassignment and transportation shall be used only if other techniques prove to be insufficient to meet the objective of providing for the greatest practicable number of stably desegregated schools. The Comprehensive Student Assignment Plan will include a contingency plan which may provide a reasonable period of time, not to exceed June 1983 to determine the extent to which other voluntary techniques have succeeded or

promise to succeed in achieving the objectives of the Consent Decree. (See PLAN, part II, pages 8 and 9).

The Board of Education will create, preserve and exempt from mandatory reassignment, schools identified as stably integrated (see PLAN, part II, page 3). Thus, Walt Disney Magnet School is exempt from mandatory reassignment of children from one public school to another.

X

The Board's action in rejecting the accepted minor Plaintiffs and in lowering the racial quota for Cuban, American-Indians and whites is arbitrary and capricious and unlawfully discriminates between white and minority students, including plaintiffs, solely on account of their nationality and race, in that:

A. Only Cubans, American-Indians and white students are stigmatized on account of their race and nationality by the aforesaid unlawful discrimination.

B. Only accepted Cubans, American-Indians, and white students are subjected to the uncertainty as to their future plans as a result of the lowering of the quotas in apparent proportion to the increase in segregated student bodies in the Chicago public school attendance area for Walt Disney Magnet School.

C. Only Cuban, American-Indians and white students are totally denied the right to attend a voluntarily integrated school equal to or better than their former school.

Said students were not provided and to this date have not been provided with any other equivalent alternative.

D. Only Cuban, American-Indians and white students were denied the right to attend an integrated magnet school although they desired to do so and having been accepted were entitled to do so until graduation, expulsion or voluntary transfer out. (See Count II and the opinion of the Honorable Judge Susan Getzendanner attached hereto as Appendix A).

E. The action of the Board contributes to the flight of white children to private, parochial, and suburban schools in direct contradiction with the stated

goals of Walt Disney Magnet School. (See Exhibit 4A, and generally Exhibits 1, 2, 3, 4, 4B, attached to the original complaint and made a part hereof), and deprives both white and minority [sic] of the benefits of voluntary integration and interracial association.

F. The racial quotas currently in application were determined by Board administrators by a simple analysis of the racial composition of the five-year-old class enrolled in 1980 in the attendance area's public schools without considering the substantial parochial and private school enrollment of white children in the affected region and the actual

population of 3, 4, 5 and 6-year old children according to Census figures; nor were parents nor the relevant community at large ever consulted in direct contradiction with the procedure in which racial and nationality quotas were approved and applied in the past.

XI

The Board's action unlawfully discriminates between white, minority and among minority students at Walt Disney Magnet School. Upon information and belief, plaintiffs state that there is sufficient vacancy at Walt Disney Magnet School for 85 more children and that such vacancies are being filled out by children on the "waiting list" other than the rejected plaintiffs. Plaintiffs allege that Walt Disney is not an overcrowded school and is, in fact,

underutilized both in its capacity for students and staff and in the physical spaces available.

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Unless this Court enjoins defendants from forcing or effectuating the Board's rejection and implementing the racial quotas, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court enter an order:

1. Declaring the action of the Board rejecting about 85 accepted children and implementing the impermissible quotas and any other orders, rules, or regulations adopted pursuant thereto to be unconstitutional and null and void;

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3. Awarding plaintiffs the reasonable costs and expenses of this action, including attorneys fees, compensatory damage sufficient to cover actual expenses and the cost of a private or parochial education for each child who is not reinstated and transferred out, and exemplary damages in the sum of $75,000 for each excluded child.

4. Granting plaintiffs such other and further relief as may be deemed just.

COUNT II

I

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343 and Section 1706 of Title 20, United States Code. The rights sought to be protected are secured by the First, Fifth and the Fourteenth Amendment [sic] of the United States Constitution, by Title 42, United States Code, Section 1981, 1983, 2000c and 2000d, and the covenants, conditions subsequent, and restrictions contained in the Quitclaim Deed dated March 24, 1968, attached to the original complaint as Exhibit 1 and made a part hereof, by and between the United States of America, Grantor, and the City of Chicago, a Municipal Corporation of the STate [sic] of Illinois and the Board of Education of Chicago, a body politic and corporate and an

agency of the State of Illinois, organized and existing under Illinois Revised Statutes Chapter 122, Section 34-2, which may be sued as such, quitclaiming a tract of land situated at 4141 North Clarendon Avenue, Chicago, Illinois, in trust for public education purposes, and the entitlement granted by the Constitution and the laws of the State of Illinois and the regulations, rules, orders and contracts adopted pursuant thereto. (See generally October 1981 opinion of the Honorable Judge Susan Getzendanner recognizing the entitlement and substantial property right of plaintiffs, attached hereto as Appendix A.).

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XII

On March 24, 1968, defendants CITY OF CHICAGO and THE BOARD OF EDUCATION OF THE CITY OF CHICAGO covenanted to utilize continuously the property described in Exhibit I hereto attached, for public educational purposes in accordance with a proposed program and plan as set forth in the application of the City of Chiago [sic] to the Department of Health, Education and Welfare dated September 14, 1967, attached hereto as Exhibit 2 and made a part hereof, and its resolution adopted January 10, 1968, attached hereto as Exhibit 3, and as further effected by a later program and plan entitled "Final Educational Specification" dated March, 1969, commonly known as the Leggett report, attached hereto and made a part hereof as Exhibit 4; the Chicago Board of Education Board Report No. 73-267-15,

dated March 28, 1973 attached hereto and made a part hereof as Exhibit 4A regarding pupil enrollment policy, and the Racial, Ethnic Survey of Students in Area C (Districts 1-7). See Summary of Racial/Ethnic Survey by District, dated 10/31/80, attached hereto and made a part hereto as Exhibit 4B.

XIII

By the terms of said quitclaim deed dated March 24, 1968, (Exhibit 1), defendant CITY OF CHICAGO or the BOARD OF EDUCATION OF THE CITY OF CHICAGO, covenanted, inter alia, as a condition subsequent to the grant of said land, to comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare, 45 CFR Part 80

issued pursuant to that title and as in effect on the date of the said quitclaim deed, to the end that, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the program and plan referred to in paragraph XII of this complaint or under any other program or activity of the City of Chicago or the Board of Education of the City of Chicago, its successors or assigns, to which said Title VI and said Regulations apply by reason of the covenants heretofore referred. Exhibits 4A and 4B.

XIV

The rejections cited in paragraph VIII of this complaint constitute a breach of the covenants, conditions subsequent and restrictions contained in the Quitclaim Deed

and implementing resolutions, programs and plans described in exhibits 1 through 4A. Said rejections are part of a series of breaches and acts of selective mismanagement which encourage "white flight." Such acts were fully restated in the original complaint and are here stated (with some modification) as follows:

1. On or about March, 1980 the Board of Education of the City of Chicago laid off a total of 34 teachers, 46 bus aides and 1 teacher aide from Walt Disney Magnet School, more than any other elementary school within the City of Chicago and further cuts are programmed in the very near future. By virtue of said cuts in personnel the Board of Education of the City of Chicago has deliberately made it impossible to comply with the conditions set forth in the quitclaim deed, Exhibit I hereto, and has

breached and continues to breach said conditions and the agreed program and plan and the requirements of Title VI of the Civil Rights Act of 1964.

2. Racial consideration entered into the Board's January, 1980 decision to terminate 34 teachers from Walt Disney Magnet School in that disproportionate number of minority teachers were terminated, thereby creating discriminatory racial imbalance in the school faculty, and in that said terminations with full knowledge of the Board of Education of the City of Chicago and its Administration impede the purpose of voluntary integration of Walt Disney Magnet School.

3. The pupil-teacher ratio is 22 to 1, higher than recommended by the plan and program and inconsistent with the goal and design of the school which utilizes open

classrooms. This is particularly true for the Early Childhood Center, which deals with 3 to 6 year old children and lost more than 50% of its staff. This has resulted in lack of discipline, loss of individualized instruction, and increased noise level and has greatly reduced meaningful teaching and communication. The atmosphere and environment created, frightening to young children, is hardly conducive to voluntary integration and understanding among children and faculty of various races.

4. Because the January, 1980 cuts eliminated all attendants in the buses and left the driver alone to supervise each busload of children while driving in rush hour traffic, both white and minority parents have withdrawn or are seriously considering withdrawing their children from the school. This has contributed to the so-

called "white flight" to the suburbs and the parochial schools and thus undermines voluntary integration, voluntary busing, risks the health of the children and impinges on the educational process.

5. The Board of Education of the City of Chicago has consciously failed to implement the goals and purposes of the covenated [sic] program and its ultimate goal of increasing desegregation of faculties and students through quality education and willing intergration [sic]. For example, the Board has disregarded the development of curricula of unusual quality which would serve all parts of the community, including nonpublic schools, and which would attract white families who are sending children to parochial schools and induce them to remain in the City. The Board has also placed in position of

authority administrators and a principal who do not support and work against the principle of voluntary integration.

6. The failure to implement the goals and purposes covenated [sic] with the Federal Government is reflected in the disharmonious and inconsistent approaches taken by a staff ignorant of or insensitive to the goals of Walt Disney Magnet School, most particularly in the approach to team teaching and in the need for a creative individualized curriculum. New teachers have been brought into the school with no inservicing to help them understand and adjust to the unique environment at Disney.

7. The defendants have adopted a policy which permits racial and socio-economic imbalance in the student population.

8. Because of the deliberate policies of the Board of Education of the City of Chicago and its administrators, frustrating the goals of voluntary integration of teachers and students through voluntary busing and quality education, the school applications have declined from 2,500 in 1979 to 1,200 in 1980. During the period from November, 1978 to December, 1979 (prior to any Board cuts) more than 18 certified teachers resigned or transferred from the school) [sic].

9. The present school administration have [sic] undermined effective team teaching by transferring teachers from one instructional area within the school to another area, and from one established team of teachers to another, for no apparent educational [sic] reason. Some of these teachers have filed their own individual

complaints with the Equal Employment Opportunity Commission, and one teacher has already won her suit.

10. The original program of parent and community participation and input is not being implemented. The Board of Education of the City of Chicago and the Principal of Walt Disney Magnet School consistently reject recommendations made by committees of the Walt Disney School Council that would increase integration. In 1980 there existed a list of 150 parent volunteers for the first floor. These parents were never contacted by the school, and the Council's request to be included in administrative planning and decision-making were [sic] denied. The School Community Coordinator position, which existed for 10 years and which as a CETA position after 1975, was allowed to lapse when the principal failed

to refill the vacancy with a new CETA worker [sic].

11. An important concept in the original specifications was the involvement of Northwestern University in teacher selection and training, and in curriculum development. This once-strong relationship, in existence for seven years, has been all but severed by the present administration.

12. The Board of Education of the City of Chicago deliberately and drastically cut the Communication Arts Center staff by two-thirds. The Center does not serve not only [sic] the Disney student population but also the entire public school system. Further, the Board has completely failed to implement the original plan to have this facility service the non-school community as well.

13. The Board eliminated 57% of all school clerks and all the teacher aides.

14. Individual classrooms within the school have become segregated. This is particularly evident for children 4 year [sic] of age.

XV

A further example of the Board's discrimination and selective mismanagement is the elimination of the Shared Facilities Program designed for the enrichment of children of all races in the [sic] art, music, science, reading and library which would make attractive to the parents, particularly white parents, to register [sic] their children. This program has been cut by 45%.

XVI

The key to success at Walt Disney Magnet School is the fact that parents will

choose voluntarily to send their children to a school of the highest quality, integrated by design. Also important is the input from parents and from the University community. The Board of Education of the City of Chicago, its Administration and the Principal of Walt Disney Magnet School have chosen not to implement the program and plan covenanted as the basis to obtain voluntary desegregation. The result is that neither white nor minority children nor the society at large have the benefit of a quality integrated education.

XVII

The acts and omissions of defendants as alleged in this complaint have denied and will continue to deny to plaintiffs their right to equality in public education without regard to race and to freedom from discrimination in the operation of Walt

Disney Magnet School, a public school. By reason of said acts and omissions, and particularly by reason of the breach of the covenants entered by defendants and the breach of the public trust, the rights of plaintiffs and the class they represent, protected under the First, Fifth and the Fourteenth Amendment [sic] to the United States Constitution and by Title 42, United States Code, Section [sic] 1981, 1983, 2000c and 2000d, and the entitlement granted by the Constitution, laws, ordinances and regulations of the State of Illinois, and the rules, orders, regulations and contracts adopted pursuant thereto, have suffered and will continue to suffer irreparable injury.

XVIII

In reliance upon the aforesaid covenant, conditions subsequent, and restrictions contained in the Quitclaim Deed

(Exhibit 1) and the programs, plan, resolutions, Legget report, Board report (Exhibits 2, 3, 4 and 4A) and in the exercise of their First Amendment right of Freedom of Association under the United States Constitution, and the entitlement to a public education granted by the Constituti-n [sic] and the laws of the State of Illinois and the ordinances, orders, rules, regulations and contracts adopted pursuant thereto, protected by the due process clause of the Fourteenth Amendment of the United States Constitution, plaintiffs applied for admission to Walt Disney Magnet School and on June 1981 were accepted. And in reliance of said acceptance they made plans and cancelled other plans, incurred expenses of time and of money, and submitted themselves to all kinds of physical, mental, dental and

medical examinations and suffered all types of inconvenience and detriment.

XIX

As a result of defendants' breach of covenant, most plaintiffs have been unable to attend any school or have been placed, at great personal expense to their parents, in private or parochial schools, and have lost the benefit of a high quality integrated public education and the benefits deriving from interracial association in a pluralistic society, all to their irreparable injury. Plaintiffs have suffered actual damages equal to their out-of-pocket expenses and lost time plus the cost of a private or parochial school wherever applicable, and exemplary damages in the sum of $75,000 for each excluded child.

WHEREFORE, plaintiffs demand judgment against defendants for specific performance

of the covenants, plans and programs contained in the proposal, Legget report and implementing reports and reinstatement into Walt Disney Magnet School plus judgment in the amount of actual damages incurred plus exemplary damages in the sum of $75,000.00 for each excluded child, plus costs, expenses, and reasonable attorney's fees.

COUNT III

I

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343, 2201, 2202 and Section 1706 of Title 20, United States Code. The rights sought to be protected are secured by the First, Fifth and the Fourteenth Amendment [sic] of the United States Constitution, by Title 42, United States Code, Section [sic] 1981, 1982, 1983,

2000c, 2000d, and by Section 1703 of Title 20, United States Code, providing for freedom of association, procedural and substantive due process, equal rights, equal protection, equal educational opportunity, and for the protection of Civil Rights.

II

Petitioners are minor children 3 and 4 years of age suing by his or her next friend, pursuant to Rule 17(c) of the Federal Rules of Civil Procedure. Each plaintiff was accepted for admission to Walt Disney Magnet School in June 1981 and said acceptance was revoked either by letter or orally during the period between August and September, 1981. A true and correct copy of a letter of acceptance and of rejection is attached hereto, marked Exhibit 5 and 6 and made a part hereof.

III

On October 10, 1981, plaintiffs received a letter from defendant CHICAGO BOARD OF EDUCATION, dated October 8, 1981, mailed October 9, 1981, stating that the Board of Education had decided to hold a hearing concerning the rejection of certain children, including plaintiffs children, to take place on Tuesday, October 20, 1981 and with such letter enclosed an agenda for the hearing. A true and correct copy of said letter and agenda is attached hereto, marked Exhibit 7 and 8 and made a part hereof.

IV

On October 9, 1981, counsel for Plaintiffs objected to the form of the hearing and prepared a letter dated October 9, 1981. Said letter was personally delivered to the Honorable Susan Getzendanner, trial judge, and defendants on

October 13, 1981, the following day after the Holiday of Monday October 12, 1981. A true and correct copy of said letter is attached hereto, marked Exhibit 9, and made a part hereof.

V

On October 20, 1981, a purported hearing was held regarding the rejection of the children, at which about 30 parents, the attorney for plaintiffs, Mr. Howard J. Sloan, District 2 Superintendent, Dr. Henry C. Springs, Associate Superintendent, Mr. John J. Bean, Interim Principal of Walt Disney Magnet School and an attorney for the Chicago Board of Education were present.

VI

At said purported hearing, plaintiffs, demanded an explanation of the reasons for rejection of their children. However, no explanation was given and defendant

contended [sic] himself with reading a letter dated June 8, 1981 from the law firm of Pressman and Hartunian, signed by a Robert C. Howel [sic], attorney at Law, stating that the Desegregation Committee composed of Defendants MARTHA JANTHO, BETTY BONOW and LUIS SALCES had decided that the change in quotas at Walt Disney Magnet School be accomplished according to the percentage of 5 year old children enrolled in the public schools according to the latest available statistics , said change in quotas to be put into effect prior to the acceptance of any children for the current academic year of 1981. No explanation was given concerning the relevancy of the change in quotas and its relationship to the philosophy and guidelines of the [sic] Chicago's current Desegregation Plan (PLAN)

which defendants allege justifies the change in quotas (see Exhibit 6).

VII

On November 19, 1981 plaintiffs received a letter from defendant, dated November 18, 1981, stating that the five and six year old children previously rejected will be admitted on a phased-in basis between now and the beginning of the second semester, February 1, 1982. Said letter was signed by HENRY C. SPRINGS, Associate Superintendent. A true and correct copy of said letter is attached hereto, marked Exhibit 10 and made a part hereof. None of the three and four year old children were admitted and no explanation for their rejection was given to the parents then or now.

VIII

The three and four year old plaintiffs continue to be denied admission to Walt Disney Magnet School to the present date.

IX

Plaintiffs allege that the decision of the Chicago Board of Education not to reinstate the three and four year old children is arbitrary, unreasonable, unjust and illegal for the following reasons:

A. The children were entitled to be informed of the reasons for their rejection as required by the constitutional concept of substantive due process in order for them to be able to rebut its applicability to themselves during the purported hearing. The vague, broad and misleading statement that the philosophy of the

Desegregation Plan required that result is not sufficient.

The failure of the Board to explain the reasons for the change in quotas prevented plaintiffs from demonstrating that said reasons, if any, are not correct and do not apply to plaintiffs, particularly after plaintiffs had established the requisite interest and entitlement in liberty and property.

B. The concept of fairness incorporated in the concept of procedural due process required the Board to produce at the purported hearing and to subject to cross-examination the members of the Desegregation Committee and

any other witnesses who apparently initiated the change in nationality and racial quotas.

Further, procedural due process required, that an impartial hearing officer hear and weigh the evidence, that a decision based on such evidence be made and that plaintiffs be notified of his decision stating in writing a detailed summary of the reasons for his decision rejecting the three and four year old children. Prior, during and after the purported hearing the burden of proof is on defendant to demonstrate that the decision excluding the children was correct and with good cause.

C. The action of the Chicago Board of Education admitting the five and six year old children and rejecting the three and four year old children denies plaintiffs the equal protection of the laws and serves no legitimate State interest. No plausible reason appears why five and six year old children have a greater right than three and four year old children or why greater procedural safeguards are applicable to the older children. The impact of the Board's action is equal accross [sic] all ages. All children have the same right and entitlement or none at all. The same interest in a quality integrated education is self evident. Further the

hardship on three and four year old children is greater for there are no available public pre-kindergarten schools in Chicago.

WHEREFORE, Plaintiffs pray:

1. That this court review the entire proceedings of defendant with respect to the rejection of the three and four year old children.

2. That this court reverse defendant's action rejecting plaintiffs and declare said action wholly null and void and of no force and effect.

3. That this court order defendant to reinstate plaintiffs as students at Walt Disney Magnet School.

4. That this court further enjoin defendants from further attempting to reject plaintiffs without cause and without due process of law.

5. That this court require defendant to grant Plaintiffs all of their rights under the Constitution and the laws of the State of Illinois and the Federal Government.

6. That this court award plaintiffs the reasonable costs and expenses of this action, including attorneys fees, compensatory damages in the sum of $10,000.00 for each child, and exemplary damages in the sum of $75,000.00 for each child.

7. That this court grant plaintiffs such other and further releief [sic] as the court may deem just and equitable.

_____
Individually, on behalf of her minor child plaintiff, and as a member of the class of plaintiffs similarly situated.

EXHIBITS ATTACHED TO THE
THIRD AMENDED COMPLAINT
ARE NOT REPRINTED HERE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JENNIFER BOTTICH, et al., | ) | |
| Plaintiffs, | ) | |
| v., | ) | NO. 80 C 4261 |
| JANE BYRNE, et al., | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

Once again this court is called upon to resolve a challenge to the admissions program utilized at Walt Disney Magnet School in Chicago. The facts underlying this latest dispute are fully set forth in my previous opinion of October 13. Briefly, they are as follows: Admissions to Disney are based upon racial and ethnic quotas. By lottery the

spaces available for the 1981-2 academic year were filled during the spring of 1981. Letters of acceptance reflecting these selections were mailed in June. Sometime during the summer, defendants decided to alter the quota levels governing this process. The number of spaces set aside for white children decreased roughly ten percent while the Cuban and American Indian allotments suffered reductions of approximately three percent. Offsetting increases were granted to Blacks (ten percent) and to Mexicans and Puerto Ricans (three percent). Because these alterations were effective as of the 1981-2 school year, a change in the school's enrollment had to occur immediately. Approximately 85 white, Cuban and American Indian children aged three to six (the current plaintiffs) consequently learned in August

that their acceptances for the coming shcool [sic] year had been revoked.

In their initial challenge to these changes plaintiffs argued first that the defendants' actions were racially discriminatory. Alternatively they claimed that they had been deprived of an "entitlement" (the right to attend Disney) without due process of law. Evidence was heard on plaintiffs' motion for a temporary restraining order commanding their admission to Disney. On the basis of the testimony and arguments offered at this hearing, I concluded that the race discrimination claim lacked substance:

> [A]t the outset of these proceedings the court inquired of plaintiffs' counsel whether the plaintiffs were attacking the Disney racial quota system. Counsel assured the court that his clients objected not to the quotas per se, but rather to the fact that they had been forced to bear the brunt of the quota's revision. Based on this representation, the court informed the parties that the temporary

> restraining order hearing would be limited to the entitlement question, for by forsaking an across-the-board challenge to the quotas, plaintiffs had essentially conceded that a race-conscious admission system was proper at Disney. Racial quotas by definition discriminate on the basis of race. Those who accept the concept of quotas have thus little ground for complaint when racially-based exclusions materialize.

Richards v. Byrne, No. 80 C 4261 (N.D. Ill. Oct. 13, 1981), slip. op at 4-5 (citation and footnotes omitted). By contrast, I found that the plaintiffs had established a likelihood of success on the merits of their due process claim. Nevertheless, after considering the interests of all concerned parties, I concluded that the best course lay not in granting plaintiffs admission pending a hearing. Rather, the simple provision of a post-deprivation hearing seemed the most preferable course under the circumstances. Such hearing was held on October 20. Subsequently, defendants overruled in part

their prior decision. By letter dated November 18, the parents of the five and six year old class members learned that their children had been reaccepted as of the beginning of the second semester (February 1, 1982).

In the latest stage of this litigation, plaintiffs now challenge the continued exclusion of the three and four year old members of the class. Seeking preliminary relief ordering their admission to Disney, they rely upon a modified version of their initial race discrimination charge. As before, they contend that as a general matter, quotas at Disney are unobjectionable. What they now [illegible]nd to be illegal are the actual numbers currently used to implement the quota concept. This argument tracks to some extent my previous observation that it is of course possible to contend "that though racial quotas

are permissible in principle at Disney, the current numbers remain objectionable on the ground that they have been set arbitrarily and capriciously." Id., slip op. at 5 n.*. Plaintiffs, however, are not contending that the defendants' new allotments were set "arbitrarily and capriciously." Rather, they posit that the defendants' decision to alter the composition of the Disney student body must be tested against the more demanding norm of strict scrutiny. According to plaintiffs the quota change is void, absent proof by defendants that it advanced a "compelling" state interest in the least restrictive manner possible.*

No case law is cited in support of this novel theory. Nor is this argument furthered by reference to decisions which merely hold

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* During oral hearing, plaintiffs' counsel confirmed that this was his theory of the case.

that strict scrutiny is the standard against which a court must test a school board's initial choice in favor of quotas per se. See Johnson v. Bd. of Ed. of City of Chicago, 604 F.2d 504, 515 n.5 (7th Cir. 1979), vacated and remanded for consideration of mootness, 101 S.Ct. 339 (1980). It is one thing to hold that a state defendant must provide extremely compelling justifications whenever plaintiffs call into question an initial determination that the social interest lies in the use of quotas. It is quite another thing to hold that this same level of justification is required when the plaintiffs concede the validity of the basic policy choice and concentrate their attack solely on the particularities of exactly how the available spaces should be allotted. To be sure, school boards cannot set the relevant numbers however they please. But, unless the federal

judiciary is to assume complete responsibility for every nuance of school adminstration, at this level of detail the reins of judicial control must be loosened and the scope of administrative discretion must be enlarged. Without deciding now the exact contours of the appropriate scope of review, I hold only that plaintiffs' claims, based as they are upon a strict scrutiny theory, are legally defective.* Having thus failed to prove a

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* Even if I were to agree that strict scrutiny is the appropriate standard of review, I would still have doubts as to whether plaintiffs would be entitled to the relief they seek. Ultimately their claimed "entitlement" to attend Disney is based upon a selection made under the old quota numbers. Yet, under plaintiffs' own theory, this selection is itself as presumptively invalid as the one later made for the new numbers, for no proofs -- or even assertions -- indicate that these initial figures could survive strict review. Plaintiffs cannot have it both ways. They cannot -- with any semblance of consistency -- argue that the initial quota numbers are somehow engraved in stone and that only the new sets of figures are inherently suspect.

likelihood of success on the merits, plaintiffs are not entitled to preliminary relief.

Susan Getzendanner
United States District Judge

Dated: November 30, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JENNIFER BOTTICH, et al., | ) | |
| Plaintiff, | ) | |
| v. | ) | NO. 80 C 4261 |
| JANE BYRNE, et al., | ) | |
| Defendants. | ) | |

ORDER

Plaintiffs' motion for leave to file motion and argument in support of motion to reconsider denial of preliminary injunction is granted. However, the court denies the motion for reconsideration.

The exact basis for these motions is far from clear. At points, plaintiffs suggest that they now believe it to be unconstitutional for Walt Disney Magnet School to use any quotas at all in connection with

its admissions program. In plaintiffs' previous and unsuccessful motions for temporary restraining order and for preliminary injunction, they raised a different theory, namely that defendants erred only in adopting the particular numbers now used by Disney. Never before have plaintiffs challenged defendants' right to impose some quota at the school.

After reading plaintiffs' papers as a whole, however, the court is not convinced that a change in theory has actually occurred. The contentions made in plaintiffs' latest filings are, to say the least, vague and ambiguous. Since the very earliest stage of this litigation, plaintiffs' counsel has repeatedly informed the court that plaintiffs were not challenging that per se legitimacy of the quota system -- only defendants' selection of the current allotments. In light of this

past history and the attendant confusion which has surrounded plaintiffs' position, the court has decided that if plaintiffs indeed wish to attack the entire quota structure, they must first file an amended complaint and, if they choose, a new motion for preliminary injunction setting forth clearly their new theory of the case.

Several additional reasons support this requirement as well. First, this case is now a procedural mess. The court has not previously ruled on the plaintiffs' new theory and it certainly is not inclined to rule on the basis of a second motion to reconsider a preliminary injunction decided on plaintiffs' original theory. The defendant Board of Education must be given an adequate procedural opportunity to defend against plaintiffs' new theory. Moreover, plaintiffs' counsel purports to represent a class of plaintiffs,

some of whom clearly would not be benefitted if the racial quota system itself was eliminated from the school. Plaintiffs' counsel may very well have a conflict of interest which would become apparent if a new pleading were required of the plaintiffs. Finally, the complexities of the relief sought by the plaintiffs -- the elimination of racial quotas from a magnet school specially established by the Board of Education pursuant to agreements with the federal government-- must be specifically addressed in any motion for preliminary injunction.

Accordingly, plaintiffs shall have leave to file an amended complaint and if they so desire, a new motion for preliminary injunction, on or before March 1, 1982. Defendant Board of Education shall answer or otherwise plead within 20 days of receipt thereof. If a motion for preliminary

injunction is filed, a supporting memorandum shall be filed on the same day; Board of Education shall have 20 days thereafter to file a responsive memorandum. Any hearing on such motion shall be set by further court order. Plaintiffs' motion for reconsideration of denial of preliminary injunction is denied.

Susan Getzendanner
United States District
Court Judge

January 30, 1982

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| HOSMAN, et al., | ) | |
| PLAINTIFFS, | ) | |
| vs. | ) | File No. 80 C 4261 |
| BYRNE, et al. | ) | (Filed February 3, 1982) |
| DEFENDANTS. | ) | |

FOURTH AMENDED COMPLAINT

COUNT I

Plaintiffs allege:

I

Jurisdiction of theis [sic] Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343, 2201, 2202 and Section 1706 of Title 20 United States Code. This is an action in equity seeking relief under Title 42, United States Code, Section [sic] 1981, and 1983. The rights sought to be protected are secured by the

First, Fifth and Fourteenth Amendment [sic] of the United States Constitution and by Title 42, United States Code, Sections 1981, 1982, 1983, 2000c, 2000d and by Section 1703 of Title 20, United States Code, providing for freedom of association, due process, equal rights, equal educational opportunity, and for the protection of Civil Rights.

II

This is a class action brought by the adult plaintiffs on behalf of themselves and their children or wards and on behalf of other adults and minors similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Member [sic] of the class are Cuban, American-Indians, and white taxpayers citizens who reside in the County of Cook, State of Illinois, within the boundaries of the Walt Disney Magnet School (hereinafter referred to as Disney)

attendance area. All members of the class are similarly situated and differentially affected by the action of the defendants. The class is so numerous that joinder of all members is impracticable. There are question [sic] of both law and fact common to the class, and the claims of the named plaintiffs are typical of the class. The named plaintiffs will adequately represent all members of the class.

III

Plaintiffs are minor Cuban, American-Indians, and white chldren aged 3, 4, [sic] and each plaintiff is suing by his or her next friend, pursuant to Rule 17(c) of the Federal Rules of Civil Procedure. In each case, the next friend identified in the caption of this action is the parent, guardian or person otherwise interested in and responsible for the welfare of the minor

on whose behalf he or she brings this action. Each plaintiff was accepted for admission to Walt Disney Magnet School in June 1981 and said acceptance was revoked either by letter or orally during the period between August and September, 1981.

IV

Defendant JANE BYRNE is the mayor of Defendant CITY OF CHICAGO, grantee of the quitclaim deed attached to the original Complaint as Exhibit I and made a part hereof. Defendant, BOARD OF EDUCATION OF THE CITY OF CHICAGO, is duly authorized by the law of the State of Illinois and is charged thereby with the duty of establishing, maintaining, and operating the Chicago School system and the Walt Disney Magnet School; Defendants, RAUL VILLALOBOS, KENNETH SMITH, SOL BRANDZEL, LUIS SALCES, EDWIN CLAUDIO, ROSEMARY JANUS, MARTHA

JANTHO, REV. WILFRED REID, BETTY BONOW, JOHN D. FOSTER, are members of the Board of Education of the City of Chicago.

V

Defendant DR. RUTH LOVE is the present Superintendent of Schools of the Chicago School District. She holds office pursuant to the laws of the State of Illinois and performs her duties under the authority and control of Defendant Board of Education of the City of Chicago. Defendant Dr. [sic] ANGELINE CARUSO is the past Acting Superintendent of Schools of the Chicago School District.

VI

Defendant, MR. HOWARD M. SLOAN, is District 2 Superintendent, Defendant DR. HARRY C. SPRINGS, is Associate Superintendent, Office of Equal Educational Opportunity, Board of Education, City of

Chicago. Defendant, DR. ROBERT GALLAGHER, is Past Principal of Walt Disney Magnet School. Defendant, JOHN J. BEAN, is the current Interim-Principal of Walt Disney Magnet School, a public school of the City of Chicago.

VII

Plaintiffs allege that on October 31, 1980, Walt Disney School had approximately 1743 pupils in all grades, of whom about 31.7% were of the black race, 44.3% were of the white race, 17.6% were of the Hispanic race, and 6.3% were of other races. Plaintiffs allege that on October 31, 1980 Walt Disney Magnet School employed 112 teachers of various other minority ethnic [sic] or racial backgrounds. There are 5 teacher aids; 2 being white, none being black, and 3 being of other minority ethnic [sic] or racial backgrounds.

VIII

On August 17, 1981 and thereafter, defendants SLOAN and SPRINGS mailed letters to approximately 35 pre-Kindergarten Cuban, American-Indian and white children, revoking their June, 1981 acceptance for admission to Walt Dsiney [sic] Magnet School, a public school in the City of Chicago, the [sic] purported reasons given by the Board were the implementation of Board Report #73-267-15, a copy of which is attached to the First Amended Complaint as Exhibit 4A, the change of racial quotas in the school attendance area, and a need to "look good" to the Federal Government in connection with the Board's desegregation efforts. The quota for white children was lowered about 10% and the quota for minority children was increased in the aggregate about 10%. The quota for Cuban and American-Indians was

lowered about 3% and the quota of Mexican and Puerto Rican Children was increased by the same amount. As a result the prior acceptance of about 85 Cuban, American-Indians and white minor children was revoked.

IX

Walt Disney Magnet School is by definition a "Stably Integrated School"; that is, a school with an enrollment of 30-70% white or 30-70% minority, and with some history of stability or has become stable. (The Board has entered into a consent decree adopting a Student Desegregation Plan [hereinafter called "PLAN"] for the Chicago Public Schools, adopted April 15, 1981; Part II of said PLAN at page 3 defined a "Stably Integrated School" as a school with 30-70% white or 30-70% minority). The Board of Education will implement magnet schools in

general to ensure that their racial/ethnic composition achieves integration/ desegregation at a level of 15-35% white by September 1982 with respect to entering grades, to the extent the goal can be achieved without excluding students presently enrolled. (See PLAN part II, pages 5 and 6). Kindergarten children shall be omitted from mandatory reassignments (See PLAN page 10) and mandatory reassignment and transportation shall be used only if other techniques prove to be insufficient to meet the objective of providing for the greatest practicable number of stably desegregated schools. The Comprehensive Student Assignment Plan will include a contingency plan which may provide a reasonable period of time, not to exceed June 1983 to determine the extent to which other voluntary techniques have succeeded or

promise to succeed in achieving the objectives of the Consent Decree. (See PLAN, part II, pages 8 and 9).

The Board of Education will create, preserve and exempt from mandatory reassignment, schools identified as stably integrated (see PLAN, part II, page 3). Thus, Walt Disney Magnet School is exempt from mandatory reassignment of children from one public school to another.

X

The Board's action in rejecting the accepted minor Plaintiffs and implementing accross [sic]-the-Board the impermissible use of certain racial quotas at Disney, is arbitrary and capricious and unlawfully discriminates between white and minority students, including plaintiffs, solely on account of their ethnicity and race, in that:

A. Only Cubans, American-Indians and white students are stigmatized on account of their race and nationality by the aforesaid unlawful discrimination.

B. Only accepted Cubans, American-Indians, and white students are subjected to the uncertainty as to their future plans as a result of the lowering of the quotas in apparent proportion to the increase in segregated student bodies in the Chicago public school attendance area for Walt Disney School.

C. Only Cuban, American-Indians and white students are totally denied the right to attend a voluntarily integrated school equal to or better than their former school.

Said students were not provided and to this date have not been provided with any other equivalent alternative.

D. Only Cuban, American-Indians and white students were denied the right to attend an integrated magnet school although they desired to do so and having been accepted were entitled to do so until graduation, expulsion or voluntary transfer out. (See Count II and the opinion of the Honorable Judge Susan Getzendanner attached hereto as Appendix A).

E. The action of the Board contributes to the flight of white children to private, parochial, and suburban schools in direct contradiction with the stated

goals of Walt Disney Magnet School. (See Exhibit 4A, and generally Exhibits 1, 2, 3, 4, 4B, attached to the original complaint and made a part hereof), and deprives both white and minority [sic] of the benefits of voluntary integration and interracial association.

F. The racial quotas currently in application were determined by Board administrators by a simple analysis of the racial composition of the five-year-old class enrolled in 1980 in the attendance area's public schools without considering the substantial surburban, parochial and private school enrollment of children in the affected region and the actual

population of 3, and 4-year old children; nor were parents nor the relevant community at large ever consulted in derect [sic] contradiction with the purpose and goal of Disney.

XI

The Board's action unlawfully discriminates between white, minority and among minority students at Walt Disney Magnet School. Upon information and belief, plaintiffs state that there is sufficient vacancy at Walt Disney Magnet School for about 35 more 3 and 4 year old children and that such vacancies are being filled out by children on the "waiting list" other than the rejected plaintiffs. Plaintiffs allege that Walt Disney is not an overcrowded school and is, in fact, underutilized both

in its capacity for students and staff and in the physical spaces available.

XII

Unless this Court enjoins defendants from forcing or effectuating the Board's rejection and implementing Accross [sic]-the-Board the impermissible use of certain racial quotas, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

WHEREFORE, Plaintiffs pray that this Court enter an order:

1. Declaring the action of the Board rejecting about 35 accepted 3 and 4 year-old children and implementing the impermissible racial quotas and any other orders, rules, or regulations adopted pursuant thereto to be unconstitutional and null and void;

2. Preliminarily and permanently enjoining defendants and their successors,

agents, and employees, from enforcing or attempting to effectuate the aforesaid rejections and racial quotas and from denying Cubans, American-Indians and white students admission to Walt Disney Magnet School solely on account of their nationality and race, and from taking any further steps to dissuade Cubans, American-Indians and white students from applying to Walt Disney Magnet School.

3. Awarding plaintiffs the reasonable costs and expenses of this action, including attorney fees, compensatory damage sufficient to cover actual expenses and the cost of a private or parochial education for each child who is not reinstated and transferred out, and exemplary damages in the sum of $75,000 for each excluded child.

4. Granting plaintiffs such other and further relief as may be deemed just.

COUNT II

I

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343 and Section 1706 of Title 20, United States Code. The rights sought to be protected are secured by the First, Fifth and the Fourteenth Amendment [sic] of the United States Constitution, by Title 42, United States Code, Section [sic] 1981, 1983, 2000c and 2000d, and the covenants, conditions subsequent, and restrictions contained in the Quitclaim Deed dated March 24, 1968, attached to the original complaint as Exhibit 1 and made a part hereof, by and between the United States of America, Grantor, and the City of Chicago, a Municipal Corporation of the STate [sic] of Illinois and the Board of

Education of the City of Chicago, a body politic and corporate and an agency of the State of Illinois, organized and existing under Illinois Revised Statutes Chapter 122, Section 34-2, which may be sued as such, quitclaiming a tract of land situated at 4141 North Clarendon Avenue, Chicago, Illinois, in trust for public education purposes, and the entitlement granted by the Constitution and the laws of the State of Illinois and the regulations, rules, orders and contracts adopted pursuant thereto. (See generally October 1981 opinion of the Honorable Judge Susan Getzendanner recognizing the entitlement and substantial property right of plaintiffs, attached hereto as Appendix A.).

II THROUGH XI

The allegations of paragraphs II through XI of Count I of this Complaint are

incorporated herein by reference as paragraphs II through XI of this Count II.

XII

On March 24, 1968, defendants CITY OF CHICAGO and THE BOARD OF EDUCATION OF THE CITY OF CHICAGO covenanted to utilize continuously the property described in Exhibit I hereto attached, for public educational purposes in accordance with a proposed program and plan as set forth in the application of the City of Chicago to the Department of Health, Education and Welfare dated September 14, 1967, attached hereto as Exhibit 2 and made a part hereof, and its resolution adopted January 10, 1968, attached hereto as Exhibit 3, and as further effected by a later program and plan entitled "Final Educational Specification" dated March, 1969, commonly known as the Leggett report, attached hereto and made a

part hereof as Exhibit 4; the Chicago Board of Education Board Report No. 73-267-15, dated March 28, 1973 attached hereto and made a part hereof as Exhibit 4A regarding pupil enrollment policy, and the Racial, Ethnic Survey of Students in Area C (Districts 1-7). See Summary of Racial/Ethnic Survey by District, dated 10/31/80, attached hereto and made a part hereto as Exhibit 4B.

XIII

By the terms of said quitclaim deed dated March 24, 1968, (Exhibit 1), defendant CITY OF CHICAGO or the BOARD OF EDUCATION OF THE CITY OF CHICAGO, covenanted, inter alia, as a condition subsequent to the grant of said land, to comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to

the Regulation of the Department of Health, Education, and Welfare, 45 CFR Part 80 issued pursuant to that title and as in effect on the date of the said quitclaim deed, to the end that, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the program and plan referred to in paragraph XII of this complaint or under any other program or activity of the City of Chiago [sic] or the Board of Education of the City of Chicago, its successors or assigns, to which said Title VI and said Regulations apply by reason of the covenants heretofore referred. Exhibits 4A and 4B.

XIV

The rejections cited in paragraph VIII of this complaint constitute a breach of the

covenants, conditions subsequent and restrictions contained in the Quitclaim Deed and implementing resolutions, programs and plans described in exhibits 1 through 4A. Said rejections are part of a series of breaches and acts of selective mismanagement which encourage "white flight." Such acts were fully restated in the original complaint and are here restated (with some modification) as follows:

1. On or about March, 1980 the Board of Education of the City of Chicago laid-off a total of 34 teachers, 46 bus aids and 1 teacher aide from Walt Disney Magnet School, more than any other elementary school within the City of Chicago, and further cuts are programmed in the very near future. By virtue of said cuts in personnel the Board of Education of the City of Chicago has deliberately made it impossible to comply

with the conditions set forth in the quitclaim deed, Exhibit I hereto, and has breached and continues to breach said conditions and the agreed program and plan and the requirements of Title VI of the Civil Rights Act of 1964.

2. Racial consideration entered into the Board's January, 1980 decision to terminate 34 teachers from Walt Disney Magnet School in that disproportionate number of minority teachers were terminated, thereby creating discriminatory racial imbalance in the school faculty, and in that said terminations with full knowledge of the Board of Education of the City of Chicago and its Administration impede the purpose of voluntary integration of Walt Disney Magnet School.

3. The pupil-teacher ratio is 22 to 1, higher than recommended by the plan and

program and inconsistent with the goal and design of the school which utilizes open classrooms. This is particularly true for the Early Childhood Center, which deals with 3 to 6 year old children and lost more than 50% of its staff. This has resulted in lack of discipline, loss of individualized instruction, and increased noise level and has greatly reduced meaningful teaching and communication. The atmosphere and environment created, frightening to young children, is hardly conducive to voluntary integration and understanding among children and faculty of various races.

4. Because the January, 1980 cuts eliminated all attendants in the buses and left the driver alone to supervise each busload of children while driving in rush hour traffic, both white and minority parents have withdrawn or are seriously

considering withdrawing their children from the school. This has contributed to the so-called "white flight" to the suburbs and the parochial schools and thus undermines voluntary integration, voluntary busing, risks the health of the children and impinges on the educational process.

5. The Board of Education of the City of Chicago has consciously failed to implement the goals and purposes of the covenated [sic] program and its ultimate goal of increasing desegregation of faculties and students through quality education and willing intergration [sic]. For example, the Board has disregarded the development of curricula of unusual quality which would serve all parts of the community, including nonpublic schools, and which would attract white families who are sending children to parochial schools and

induce them to remain in the City. The Board has also placed in position of authority administrators and a principal who do not support and work against the principle of voluntary integration.

6. The failure to implement the goals and purposes covenated [sic] with the Federal Government is reflected in the disharmonious and inconsistent approaches taken by a staff ignorant of or insensitive to the goals of Walt Disney Magnet School, most particularly in the approach to team teaching and in the need for a creative individualized curriculum. New teachers have been brought into the school with no inservicing to help them understand and adjust to the unique environment at Disney.

7. The defendants have adopted a policy which permits racial and socio-

economic imbalance in the student population.

8. Because of the deliberate policies of the Board of Education of the City of Chicago and its administrators, frustrating the goals of voluntary integration of teachers and students through voluntary busing and quality education, the school applications have declined from 2,500 in 1979 to 1,200 in 1980. During the period from November, 1978 to December, 1979 (prior to any Board cuts) more than 18 certified teachers resigned or transferred from the school) [sic].

9. The present school administration have [sic] undermined effective team teaching by transferring teachers from one instructional area within the school to another area, and from one established team of teachers to another, for no apparent edu-

ational [sic] reason. Some of these teachers have filed their own individual complaints with the Equal Employment Opportunity Commission, and one teacher has already won her suit.

10. The original program of parent and community participation and input is not being implemented. The Board of Education of the City of Chicago and the Principal of Walt Disney Magnet School consistently reject recommendations made by committees of the Walt Disney School Council that would increase integration. In 1980 there existed a list of 150 parent volunteers for the first floor. These parents were never contacted by the school, and the Council's request to be included in administrative planning and decision-making were [sic] denied. The School Community Coordinator position, which existed for 10 years and

which as a CETA position after 1975, was allowed to lapse when the principal failed to refill the vacancy with a new CETA worker [sic] .

11. An important concept in the original specifications was the involvement of Northwestern University in teacher selection and training, and in curriculum development. This once-strong relationship, in existence for seven years, has been all but severed by the present administration.

12. The Board of Education of the City of Chicago deliberately and drastically cut the Communication Arts Center staff by two thirds. The Center does not serve not only [sic] the Disney student population but also it has failed completely to serve the entire public school system. Further, the Board has completely failed to implement the

original plan to have this facility service the non-school community as well.

13. The Board eliminated 57% of all school clerks and all the teacher aides.

14. Individual classrooms within the school have become segregated. This is particularly evident for children 4 year [sic] of age.

XV

A further example of the Board's discrimination and selective mismanagement is the elimination of the Shared Facilities Program designed for the enrichment of children of all races in the [sic] art, music, science, reading and library which would make attractive to the parents, particularly white parents, to register [sic] their children. This program has been cut by 45%.

XVI

The key to success at Walt Disney Magnet School is the fact that parents will choose voluntarily to send their children to a school of the highest quality, integrated by design. Also important is the input from parents and from the University community. The Board of Education of the City of Chicago, its Administration and the Principal of Walt Disney Magnet School have chosen not to implement the program and plan covenanted as the basis to obtain voluntary desegregation. The result is that neither white nor minority children nor the society at large have the benefit of a quality integrated education.

XVII

The acts and omissions of defendants as alleged in this complaint have denied and will continue to deny to plaintiffs their

right to equality in public education without regard to race and to freedom from discrimination in the operation of Walt Disney Magnet School, a public school. By reason of said acts and omissions, and particularly by reason of the breach of the covenants entered by defendants and the breach of the public trust, the rights of plaintiffs and the classes they represent, protected under the First, Fifth and the Fourteenth Amendment [sic] to the United States Constitution and by Title 42, United States Code, Sections 1981, 1983, 2000c and 2000d, and the entitlement granted by the Constitution, laws, ordinances and regulations of the State of Illinois, and the rules, orders, regulations and contracts adopted pursuant thereto, have suffered and will continue to suffer irreparable injury.

XVIII

In reliance upon the aforesaid covenant, conditions subsequent, and restrictions contained in the Quitclaim Deed (Exhibit 1) and the programs, plan, resolutions, Legget report, Board report (Exhibits 2, 3, 4 and 4A) and in the exercise of their First Amendment right of Freedom of Association under the United States Constitution, and the entitlement to a public education granted by the Constituti-on [sic] and the laws of the State of Illinois and the ordinances, orders, rules, regulations and contracts adopted pursuant thereto, protected by the due process clause of the Fourteenth Amendment of the United States Constitution, plaintiffs applied for admission to Walt Disney Magnet School and on June 1981 were accepted. And in reliance of said

acceptance they made plans and cancelled other plans, incurred expenses of time and of money, and submitted themselves to all kinds of physical, mental, dental and medical examinations and suffered all types of inconvenience and detriment.

XIX

As a result of defendants' breach of covenant, most plaintiffs have been unable to attend any school or have been placed, at great personal expense to their parents, in private or parochial schools, and have lost the benefit of a high quality integrated public education and the benefits deriving from interracial association in a pluralistic society, all to their irreparable injury. Plaintiffs have suffered actual damages equal to their out-of-pocket expenses and lost time plus the cost of a private or parochial school wherever

applicable, and exemplary damages in the sum of $75,000 for each excluded child.

WHEREFORE, plaintiffs demand judgment against defendants for specific performance of the covenants, plans and programs contained in the proposal, Legget report and implementing reports and reinstatement into Walt Disney Magnet School plus judgment in the amount of actual damages incurred plus exemplary damages in the sum of $75,000.00 for each excluded child, plus costs, expenses, and reasonable attorney's fees.

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COUNT III

I

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section [sic] 1331, 1343, 2201, 2202 and Section 1706 of Title 20, United States Code. The rights sought to be protected are

secured by the First, Fifth and the Fourteenth Amendment [sic] of the United States Constitution, by Title 42, United States Code, Section 1981, 1982, 1983, 2000c, 2000d, and by Section 1703 of Title 20, United States Code, providing for freedom of association, procedural and substantive due process, equal rights, equal protection, equal educational opportunity, and for the protection of Civil Rights.

II

Petitioners are minor children 3 and 4 years of age suing by his or her next friend, pursuant to Rule 17(c) of the Federal Rules of Civil Procedure. Each plaintiff was accepted for admission to Walt Disney Magnet School in June 1981 and said acceptance was revoked either by letter or orally during the period between August and September, 1981. A true and correct copy of

a letter of acceptance and of rejection is attached hereto, marked Exhibit 5 and 6 and made a part hereof.

III

On October 10, 1981, plaintiffs received a letter from defendant CHICAGO BOARD OF EDUCATION, dated October 8, 1981, mailed October 9, 1981, stating that the Board of Education had decided to hold a hearing concerning the rejection of certain children, including plaintiffs children, to take place on Tuesday, October 20, 1981 and with such letter enclosed an agenda for the hearing. A true and correct copy of said letter and agenda is attached hereto, marked Exhibit 7 and 8 and made a part hereof.

IV

On October 9, 1981, counsel for Plaintiffs objected to the form of the hearing and prepared a letter dated October

9, 1981. Said letter was personally delivered to the Honorable Susan Getzendanner, trial judge, and defendants on October 13, 1981, the following day after the Holiday of Monday October 12, 1981. A true and correct copy of said letter is attached hereto, marked Exhibit 9, and made a part hereof.

V

On October 20, 1981, a purported hearing was held regarding the rejection of the children, at which about 30 parents, the attorney for plaintiffs, Mr. Howard J. Sloan, District 2 Superintendent, Dr. Henry C. Springs, Associate Superintendent, Mr. John J. Bean, Interim Principal of Walt Disney Magnet School and an attorney for the Chicago Board of Education were present.

VI

At said purported hearing, plaintiffs, demanded an explanation of the reasons for rejection of their children. However, no explanation was given and defendant contended [sic] himself with reading a letter dated June 8, 1981 from the law firm of Pressman and Hartunian, signed by a Robert C. Howel [sic], attorney at Law, stating that the Desegregation Committee composed of Defendants MARTHA JANTHO, BETTY BONOW and LUIS SALCES had decided that the change in quotas at Walt Disney Magnet School be accomplished according to the percentage of 5 year old children enrolled in the public schools according to the latest available statistics , said change in quotas to be put into effect prior to the acceptance of any children for the current academic year of 1981. No explanation was

given concerning the relevancy of the change in quotas and its relationship to the philosophy and guidelines of the [sic] Chicago's current Desegregation Plan (PLAN) which defendants allege justifies the change in quotas (see Exhibit 6).

VII

On November 19, 1981 plaintiffs received a letter from defendant, dated November 18, 1981, stating that the five and six year old children previously rejected will be admitted on a phased-in basis between now and the beginning of the second semester, February 1, 1982. Said letter was signed by HENRY C. SPRINGS, Associate Superintendent. A true and correct copy of said letter is attached hereto, marked Exhibit 10 and made a part hereof. None of the three and four year old children were admitted and no explanation for their

rejection was given to the parents then or now.

VIII

The three and four year old plaintiffs continue to be denied admission to Walt Disney Magnet School to the present date.

IX

Plaintiffs allege that the decision of the Chicago Board of Education not to reinstate the three and four year old children is arbitrary, unreasonable, unjust and illegal for the following reasons:

A. The children were entitled to be informed of the reasons for their rejection as required by the constitutional concept of substantive due process in order for them to be able to rebut its applicability to themselves during the purported hearing. The vague,

broad and misleading statement that the philosophy of the Desegregation Plan required that result is not sufficient.

The failure of the Board to explain the reasons for the change in quotas prevented plaintiffs from demonstrating that said reasons, if any, are not correct and do not apply to plaintiffs, particularly after plaintiffs had established the requisite interest and entitlement in liberty and property.

B. The concept of fairness incorporated in the concept of procedural due process required the Board to produce at the purported hearing and to subject

to cross-examination the members of the Desegregation Committee and any other witnesses who apparently initiated the change in nationality and racial quotas.

Further, procedural due process required, that an impartial hearing officer hear and weigh the evidence, that a decision based on such evidence be made and that plaintiffs be notified of his decision stating in writing a detailed summary of the reasons for his decision rejecting the three and four year old children. Prior, during and after the purported hearing the burden of proof is on defendant to demonstrate that the decision

excluding the children was correct and with good cause.

C. The action of the Chicago Board of Education admitting the five and six year old children and rejecting the three and four year old children denies plaintiffs the equal protection of the laws and serves no legitimate State interest. No plausible reason appears why five and six year old children have a greater right than three and four year old children or why greater procedural safeguards are applicable to the older children. The impact of the Board's action is equal accross [sic] all ages. All children have the same right and entitlement or none at all. The same interest in

a quality integrated education is self evident. Further the hardship on three and four year old children is greater for there are no available public pre-kindergarten schools in Chicago.

WHEREFORE, Plaintiffs pray:

1. That this court review the entire proceedings of defendant with respect to the rejection of the three and four year old children.

2. That this court reverse defendant's action rejecting plaintiffs and declare said action wholly null and void and of no force and effect.

3. That this court order defendant to reinstate plaintiffs as students at Walt Disney Magnet School.

4. That this court further enjoin defendants from further attempting to reject

plaintiffs without cause and without due process of law.

5. That this court require defendant to grant Plaintiffs all of their rights under the Constitution and the laws of the State of Illinois and the Federal Government.

6. That this court award plaintiffs the reasonable costs and expenses of this action, including attorneys fees, compensatory damages in the sum of $10,000.00 for each child, and exemplary damages in the sum of $75,000.00 for each child.

7. That this Court grant plaintiffs such other and further releief as the court may deem just and equitable.

_____

Individually, on behalf of her minor child plaintiff, and as a member of the class of plaintiffs similarly situated.

WALT DISNEY MAGNET SCHOOL
4140 North Marine Drive
Chicago, Illinois 60613
525-3731 or 525-7878

Dear Parents: June, 1981

I am privileged to inform you that your child Marie Jennifer Botich has been selected to attend the Walt Disney Magnet School this fall. We plan to enroll all new children during the first two weeks in September. Children will be phased in to attend school during the weeks that follow enrollment.

During the week of June 8 through June 12, 1981, we are providing screening services by the Chicago Board of Education for all children selected for our Early Childhood Center.

Please read the enclosed sheets on screening and return the forms signed when you come for your screening appointment. At the time of your screening appointment,

please enter the building through the Communication Arts Center, as you did when you came for application. For your appointment you will need to spend approximately two hours with your child at Disney. While you are here for the screening appointment, you will be given a packet of information about fall enrollment. You will also be asked to complete forms giving us some valuable information about your child, including emergency information.

We are looking forward to meeting you when you bring your child in for screening this June.

Sincerely,

Robert Gallagher
Principal

Exhibit 5

WALT DISNEY MAGNET SCHOOL

August 17, 1981

Dear Parents/Guardians of _____:

This summer the Office of Equal Educational Opportunity of the Chicago Board of Education announced racial guidelines for entering students for Walt Disney Magnet School effective September, 1981.

The decision to accept students at Disney is based upon their position on the computer printout.

We are sorry to inform you that according to the above Guidelines, your child will not be entering Disney in September but instead has been placed on the Hold List. Your child will be eligible for placement at Disney until February, 1982, depending upon future openings and your child's position on the Hold List.

We sincerely regret any inconvenience this change may cause you but Disney has now been directed to reflect the philosophy and Guidelines of Chicago's current Desegregation Plan.

Sincerely yours,

Robert Gallagher
Principal

RG:afg

Approved: Howard Sloan
District Superintendent

Exhibit 6

BOARD OF EDUCATION
CITY OF CHICAGO
228 North LaSalle Street
Chicago, Illinois 60601
Telephone 641-4141

Ruth B. Love
General Superintendent
of Schools
Telephone 641-4400

Office of Equal
Educational
Opportunity
641-4950

October 8, 1981

Dear Parent or Guardian:

The Board of Education has decided to hold a hearing concerning the rejection of certain children, including your child, from the Walt Disney Magnet School for the current school year. The hearing will take place on Tuesday, October 20, 1981, at Senn High School - Social Room 115, 5900 North Glenwood, Chicago, Illinois. An agenda for the hearing is enclosed.

You are invited to attend this hearing and present your views. Several represent-

atives of the Board of Education will be present at the hearing, including Mr. Howard J. Sloan, District 2 Superintendent, and myself.

Sincerely,

Henry C. Springs
Associate Superintendent

HCS:pc
Enclosure

Exhibit 7

SENN HIGH SCHOOL - SOCIAL ROOM #115

Tuesday, October 20, 1981
8:30 a.m. - 10:30 a.m.

TOPIC: Disney Magnet School Admission Policies

AGENDA

| | | |
|---|---|---|
| 8:30 | Welcome and Statement of Facts | Board of Education Administrators |
| 8:45 | Presentation of Certain Parents' Opposition | Parent's Attorney |
| 9:00 | Statement | Expert Witness (to be selected by Parents' Attorney) |
| 9:10 | Comments | Each parent who wishes to speak (five minutes maximum each) |
| | Break | |
| | Questions and Answer Session (approximately 1 hour) | |
| | Summary of Position | Parents' Attorney |

| | |
|---|---|
| Closing Remarks | Board of Education Administrators |
| Meeting Concludes | |

EXHIBIT 8

YVON D. ROUSTAN
ATTORNEY AT LAW
1527 NORTH ASHLAND AVENUE
CHICAGO, ILLINOIS 60622
TELEPHONE (312)227-4944

October 9, 1981

Honorable Susan Getzendanner
Judge, United States District
Court
219 South Dearborn Street
Chicago, Illinois

Mr. Michael J. Murray
Board of Education
Law Department
228 North La Salle Street
Chicago, Illinois

Dear Judge Getzendanner and Mr. Murray:

On October 9, 1981 at 3:00 p.m. I received by personal delivery copies of the proposed letter to the affected parents and agenda for the hearing to be had October 20, 1981 in connection with the above entitled matter. Attorney Kracjir informed me by

telephone that the "proposed" letter and agenda had been mailed to the parents the morning of October 9, 1981. I informed Mrs. Marie Williams, Judge Susan Getzendanner's Secretary, that on that day I had scheduled a meeting with the parents at 7:30 p.m. to discuss the revision proposed by Judge Getzendanner mailed to my 1527 N. Ashland office and received by my office October 9, 1981. I objected vehemently to the fact that by mailing the letters and Agenda the Board was precluding the parents and their attorney from participating in the preparation of an adequate hearing.

The most serious objections to the agenda are:

a) The hour from 8:30 a.m. - 10:30 a.m. on a Tuesday morning will prevent most parents from attending the hearing. The parents either work or are unable to obtain

baby sitters for their 3, 4 or 5 year old children at that hour. It is suggested that the hour be changed to 7:30 p.m. to 10:30 p.m. the same day.

b) No opportunity is given the students to request that a Board member or a hearing officer be present at the hearing so that a fair and impartial decision be rendered. Although both Mr. Howard J. Sloan and Dr. Henry C. Springs are welcomed, since they were directly involved in the decision to change the quotas they should not be both witnesses and decision makers at the hearing.

c) The question and answer period does not present an opportunity to cross-examine the witnesses, Mr. Sloan, Dr. Springs and others.

d) Although no court reporter will be present at the hearing, the hearing officer

should present a written summary of the evidence with his finding and recommendations and a tape recording of the hearing should be kept by the hearing officer, and the parents should be notified of his decision stating in writting [sic] a detailed statement of his reasons for his decision.

e) The parents or guardians should be notified of the hearing using registered or certified mail and the parents attorney should be provided a copy of said registered or certified mail. Otherwise there is no way to know who, if anyone received notice of the hearing.

f) The burden of proof is improperly placed on the parents and children.

Because of the above procedural infirmities we strongly feel that the scheduled hearing fails to provide an

apportunity [sic] to have a fair and impartial determination.

Because the court is of the opinion that the agenda for the hearing would result in a hearing that would meet minimal due process requirements under the facts and circumstances of the case and because plaintiffs are free to challenge the adequacy of the hearing on due process grounds after the hearing takes place (See Draft Memorandum Opinion and Order of Judge Susan Setzendanner [sic] footnote at pages 7 and 8), whether or not the above amendments to the agenda are implemented, every effort shall be made by the parents and plaintiffs attorney to have as productive a hearing as

possible under the imposed restrains, subject to the objections above stated.

Very truly yours,

YVON D. ROUSTAN,
Attorney for Plaintiffs

cc: Robert W. Fioretti
file
YDR: mr

EXHIBIT 9

Chicago Board Of Education
228 North LaSalle Street
Chicago, Illinois 60601

Ruth B. Love
General Superintendent of Schools

November 18, 1981

Dear Parent or Guardian:

As you know a hearing was held on Tuesday, October 20, 1981 at the Senn High School regarding placements at Walt Disney Magnet School.

As a result of that hearing and in consideration of other relevant factors, I, in conjunction with other appropriate Board of Education staff, have determined that those five and six year old children previously rejected will be admitted on a phased-in basis between now and the beginning of the second semester, February 1, 1982.

The principal will contact the parent or guardian in the rank order that the affected child appears on the original list.

These are placements pending Board approval of a revised enrollment policy at Disney Magnet School.

Sincerely,

Henry C. Springs
Associate Superintendent

HCS:mt

Exhibit 10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| RICHARDS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | No. 80 C 4261 |
| | ) | |
| BYRNE, et al. | ) | (Entered October |
| | ) | 13, 1981) |
| Defendants. | ) | |

Memorandum Opinion and Order

Susan Getzendanner
United States District Judge

THIS MEMORANDUM OPINION AND ORDER IS REPRINTED IN THIS APPENDIX AT 263a.

APPENDIX A

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable Susan Getzendanner

Cause No. 80 C 4261 Date Nov. 18, 1983

Title of Cause Richard v. Byrne

Brief Statement of Motion _____

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel _____

Representing _____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

Reserve space below for notations by minute clerk

Docketed
Nov 22 1983

The court directs the parties' attention to Johnson v. Board of Ed. 567 F. Supp. 290 (N.D. Ill. 1983).

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | No. 80 C 5124 |
| --vs.-- | ) | |
| | ) | Hon. |
| BOARD OF EDUCATION OF | ) | Milton I. |
| THE CITY OF CHICAGO | ) | Shadur |
| | ) | (Presented |
| Defendants, | ) | 12/15/83) |

MOTION FOR LEAVE TO INTERVENE
PURSUANT TO RULE 24, F.R. CIV. P.

The parties listed herein (hereinafter, "Applicants"), by their attorney, respectfully move this Court for leave, pursuant to Rule 24, F. R. Civ. P., to intervene as plaintiffs-intervenors in the above-captioned action, for the purpose of being heard on the constitutionality of the Desegregation Plan in its entirety. In support thereof, they respectfully represent that:

1. Applicant Mary Kay Jarvis is a resident of the State of Illinois, city of

Chicago and the mother of Michael D. Wachowiak, a 5 year old minor who on or about August 1981 was rejected from Walt Disney Magnet School, an elementary Public School,(hereinafter "Disney") by the Chicago Board of Education (hereinafter "Board") under the excuse that the Office of Equal Educational Opportunity of the Chicago Board of education had announced new racial guidelines under the Chicago Desegregation Plan. This minor child was rejected in spite of the fact that he had been previously accepted at Disney on June 1981, the racial guidelines of the Desegregation Plan do not require the exclusion from any public school of any children, and the rejected child was not afforded <u>any</u> realistic or even unrealistic meaningful opportunity to attend a Chicago Public school in an integrated setting.

2. Applicant Judith Towers is a resident of the State of Illinois, city of Chicago and the mother of Kent Towers, a 6 year old minor who on or about August 1981 was rejected from Disney by the Board under the excuse that the Office of Equal Educational Opportunity of the Chicago Board of education had announced new racial guidelines under the Chicago Desegregation Plan. This minor child was rejected in spite of the fact that he had been previously accepted at Disney on June 1981, the racial guidelines of the Desegregation Plan do not require the exclusion from any public school of any children, and the rejected child was not afforded <u>any</u> realistic or even unrealistic meaningful opportunity to attend a Chicago Public school in an integrated setting.

3. Applicant T. Lee is a resident of the State of Illinois, city of Chicago and

the parent of Karen Lee a 7 year old minor who on or about August 1981 was rejected from Disney by the Board under the excuse that the Office of Equal Educational Opportunity of the Chicago Board of education had announced new racial guidelines under the Chicago Desegregation Plan. This minor child was rejected in spite of the fact that she had been previously accepted at Disney on June 1981, the racial guidelines of the Desegregation Plan do not require the exclusion from any public school of any children, and the rejected child was not afforded <u>any</u> realistic or even unrealistic meaningful opportunity to attend a Chicago Public school in an integrated setting.

4. The above Applicants are also parties plaintiffs in a case entitled Charles J. Richards, et al., vs. Jane Byrne, The Board of Education of the City

of Chicago, et al., in Case No. 80C4261, filed on or about August 11,1980 and currently pending before the Honorable Susan Getzendanner, District Judge.

5. On November 10,1983 a pre-trial hearing was held in the chambers of Judge Getzendanner. The Court pointed out that in light of the arguments of counsel that the Desegregation Plan is unconstitutional (this argument of counsel for Plaintifs [sic] is fully set out in the attached memorandum in support of this Motion to intervene) the Court had no judicial power to take any action contrary to the determination of constitutionality rendered by the Honorable Milton I. Shadur in the instant case. This conclusion leaves Applicants herein with only one alternative, that is to Petition this Court for leave to Intervene instanter.

6. As is fully maintained in the attached Memorandum in support of this petition Applicants do possess a direct, substantial and significantly legally protectable interest in the subject matter of this action. Further the disposition of this case without the presence of Applicants hinders their ability to protect their interest, and finally Applicants interest is not being adequately protected by the United States nor by the Chicago Board of Education. The United States and the Board of Education have engaged in a course of conduct that renders them unable adequately to represent the interest of Applicants, including but not limited to:

a. Failing to investigate the actions of the Board of Education at Walt Disney Magnet School in disregard of their affirmative duty.

b. Failing to present to this Court a complete factual record and covering up the actions of the Board of Education.

c. Cooperating in collusion with the Board in a Plan designed and implemented to create unconstitutional "racial quotas" in the city of Chicago.

d. Misleading this Court as to the impact of the "racial quotas" in Chicago.

e. Presenting in collusion with the Board a legal theory that not even peripherally considers the interest of Applicants and the remaining injured parties.

WHEREFORE, Applicants respectfully request that their Motion to Intervene be granted.

11/27/83

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STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| --vs.-- | ) | No. 80 C 5124 |
| | ) | |
| BOARD OF EDUCATION OF THE CITY OF CHICAGO | ) | Hon. Milton I. Shadur |
| | ) | |
| Defendant, | ) | |

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE

I. INTRODUCTION

This case concerns the constitutionality of the consent decree entered into between the United States and the Chicago Board of Education (hereinafter the "Board") in 1980, following the filing of a lawsuit by the United States alleging unlawful segregation in the Chicago Public School System and the Memorandum Opinion and order of the Honorable Milton I.

Shadur, United States District Judge, dated January 6,1983, in this case (hereinafter referred to as "Opinion"). Specifically, the Opinion found that the Desegregation Plan passed constitutional muster in light of the "complete factual record" developed in the action, See Kathy Sue Johnson, et al., v. Board of Education of the City of Chicago, 567 F. Supp. 290, 293 (N.D. Ill. 1983).

Proposed intervenors are individuals who have been irreparably insured and who will continue to be irreparably injured by the implementation of a Desegregation Plan that is unconstitutional as a whole. They include parents of minor children who were excluded from Walt Disney Magnet School, an elementary public school of the City of Chicago (hereinafter "Disney") on or about August 1981 without providing them with a meaningful opportunity to attend a Chicago

Public School in an integrated setting. And all parents of minor children who will be injured by the implementation of certain unconstitutional "racial quotas" in the City of Chicago.

In applying for intervention before this Court, applicants wish to make clear that the scope of their interest is not limited to Disney for applicants claim that the system-wide desegregation plan does not distribute burdens equitably between the races and that the Plan is in fact designed and implemented, as a disguised fixed racial quota ceiling in violation of the equal protection rights of all affected children. This conclusion follows from the synergism of the Plan, from the combined action and effect of the Whole Plan and its Parts. It follows because the Plan is no mere collection of parts but a whole constructed out of these parts, in much the

same manner that a mere collection of bricks is neither a house nor a wall. A whole like a house or a wall has its parts organized or arranged in certain definite ways. That is why this Court stated that "The whole really is more than the sum of its parts: The whole Plan desegregates the school system by techniques that individually classify by race and that individually (that is, if a particular technique were the only ingredient in the game plan) might be impermissible under the Constitution." Johnson v. Board of Education, Id, at 296. Thus, if the Board is held strictly to the Constitutional requirements, then the whole Plan, in its synergistic aspect, must meet strict scrutiny.

Curiously enough, these applicants had criticized the Plan in synergistic fashion on February 22,1983 in the Memorandum of

law entitled "Plaintiffs' Additional Memorandum in Support of Motion for Preliminary Injunction" presented to Judge Susan Getzendanner in case 80C 4261 mentioned in our Motion for Leave to Intervene. The complete essence and detail of our challenge to the Plan is contained bluntly in such Memorandum, the Board's response to the same, and our reply to the Board. They are attached and incorporated hereto as Addendum I and made a part hereof in support of our motion for intervention.

II. ARGUMENT

A. Intervenors Meet the Criteria For Intervention As set Forth In Rule 24(a)(2).

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides, in pertinent part, that a party may intervene in an action as a matter of right whenever: 1) the application is timely; 2) the applicant claims an interest relating to the transaction that is the subject of the

action; 3) the applicant can show that its interest may, as a practical matter, be impaired or impeded by disposition of the action; and, 4) the applicant's interest may not be adequately represented by existing parties. U.S. v. Bd. of Ed. of City of Chicago, 88 F. R. D. 679, 684 (N.D. Ill. 1981), citing NAACP v. New York, 413 U.S. 345, 369 (1973). In the instant case, the parties fit within the parameters of the rule. Indeed in the Johnson case cited above, the Supreme Court of the United States ordered that that case be consolidated and considered in light of the instant case. Johnson v. Board of Ed. of the City of Chicago, 457 U.S. 52, 53-54, 102 S. Ct. 2223, 2224 72 L. Ed. 2d 668 (1982), and See Johnson v. Bd. of Ed. of City of Chicago, 567 F. Suppl. 290, 293 (N.D. Ill. 1983). Further, intervenor's intimate familiarity with the issues raised

by their motion will be of material aid to this Court in resolving the immensely important issues before it and will assist the Court in deciding the issue in light of the "complete factual record".

1. Intervenors' Application is Timely

In assessing the timeliness of intervenors' application, this Court must review it in light of "all the circumstances." NAACP v. New York, 413 U.S. 345, 366 (1973).

As in the Johnson case the Board chided plaintiffs for not having petitioned to intervene in the United States action. As in the Johnson case plaintiffs can quite correctly respond that their "failure" to intervene must be read in light of the fact their lawsuits predated the United States action, but in any event on March 23, 1983 plaintiffs responded to the Board's rebuke as follows:

> "In view of Judge Shadur's denial of Defendants motion to consolidate the Disney case with the Desegregation case, as requested by this [Judge Getzendanner] Court, which motion was unopposed by Plaintiffs, and the prior denial by Judge Shadur to the NAACP and the Urban League to intervene in that case, a separate motion to intervene by plaintiffs herein would be a frivolous exercise in futility. Nonetheless, the Board's open invitation to intervene in that case should not be ignored, for Judge Shadur should be informed of the concrete factual situation and the actions of the Board at Disney. We withhold any action at this time out of deference to this Honorable Court".

As stated in our motion for Leave to Intervene herein it was not until November 10,1983 that Judge Getzendanner stated at the pre-trial conference that she was powerless to do anything regarding the issue of the constitutionality of the United States case which issue had been determined before this Court. Aplicants [sic] herein are proceeding to make good in their promise to inform this court and make a "complete factual record". See also

United Airlines Inc. v. McDonald, 432 U.S. 385, 431-32 (1977); Legal Aid Soc. of Alameda Co. v. Dunlop, 618 F.2d 48, 50 (9th Cir. 1980); Stallworth v. Monsanta Co., 558 F. 2d 257, 263-65 (5th Cir. 1977).

The "timeliness" requirement in Rule 24 has thus been construed not as an absolute concept, but as a relative term, requiring consideration not only of how much time has elapsed since intervenors knew of their interest in the case, but also of the possible harm or prejudice to existing parties arising from a granting of the motion, and the significant impact on the right of the intervenors should their motion be denied. Equal Employment Opportunity Commission v. United Airlines, 545 F. 2d 946, 949 (7th Cir. 1975). Under appropriate circumstances, a determination of the timeliness of a motion for intervention may also entail consideration

of the purpose for which the intervention is sought. Natural Resources Defense Council v. Costle, 561 F. 2d 904, 907 (D.C. Cir. 1977). United States v. American Telephone and Telegraph Co., 642 F. 2d 1285, 1294 (D.C. Cir. 1980).

The critical inquiry is "when the intervenor became aware that its interest would no longer be protected adequately by the parties ..." Legal Aid Society of Alameda Co. v. Dunlop, 618 F. 2d at 50, citing United Airlines Inc. v. McDonald, 432 U.S. at 394 (emphasis added). The actual time that the would-be intervenor first learned of the pendency of the case "is not relevant to the issue of whether his application was timely." Stallworth v. Monsanto Co., 558 F. 2d at 265.

In the instant case, it was until Judge Susan Getzendanner informed Plaintiffs that she was powerless to act

regarding the issue of the constitutionality of the Desegregation Plan on November 10,1983 that proposed intervenors concluded that their interest would not longer be protected adequately by the court and the Board. Once this fact became evident, intervenors moved swiftly to ensure a more informed and representative proceeding by moving for leave to intervene before this Court. The issue of the constitutionality of the Desegregation Plan concerns these Applicants. The harm and prejudice arising from the application of an unconstitutional Desegregation Plan and the incomplete factual record more than makes up for any harm or prejudice by the original parties plaintiffs particulary when these parties have failed to fulfill their affirmative duties. This is particularly true where, as here, intervenors' participation would

substantially aid the Court in its resolution of the difficult questions before it concerning the constitutionality and implementation of the consent decree. See Natural Resources Defense Council v. Costle, 561 F. 2d at 129; United States v. Bd. of School Commissioners, Indianapolis, Ind., 466 F. 2d 573, 576 (7th Cir. 1972). This is especially true when the denial of the motion will prevent intervenors from otherwise litigating their claims. See Rosamanta v. United Airlines, 537 F.2d 915 (7th Cir. 1976), aff'd sub nom, United Airlines v. McDonald. 432 U.S. 385 (1977); United States v. American Telephone and Telegraph Co., 642 F. 2d 1285, 1294 (D.C. Cir. 1980).

Proposed intervenors will be prejudiced if their application is denied. At issue in this proceeding is the deprivation of the innate right of each

individual not to be deprived of liberty and property and the equal protection of the laws. Such rights of said individuals are personal and cannot be taken away by any government. Such rights do not belong to the whole but belong to the individual members. The whole does not have a right of liberty nor does it have a right of equal protection. And in this respect at least the whole is not greater than its parts. It is because approval of the Plan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum, isolated from other aspects of the Plan, that this Court must apply strict scrutiny to the complex whole taking into account that the component parts are not independent and are related to each other. This the parties have not done and have disregarded. As argued in our Addendum I,

hereto attached, there are two standards being applied within the Desegregation Plan, one for the system as a whole, the other for designated Magnet schools. That applied to designated Magnet schools is clearly unconstitutional for it amounts to a fixed "racial quota" that cannot be deviated. And it is implemented as a fixed "racial quota" as very clearly demonstrated at Disney and other designated magnet schools.

Furthermore this is not isolated Morgan Park, Gage Park, Harrison High and Walt Disney Magnet school but <u>every</u> designated Magnet school system-wide. An apt analogy would be that it is like poison in the blood of the whole body and not just an isolated wart.

Furthermore, even if the Court should feel that the double standard applied to designated Magnet school is in itself a

fact isolated from other aspects of the Plan, not poison but a mere wart, no consideration has been given to the effect of a fixed "racial quota" nor to the elimination of the 35%-65% range for such designated Magnet schools upon the Plan as an entirety, considering that Chicago' [sic] designated Magnet and neighborhood schools are distributed according to racial demographics. We endeavor in the attached Addendum I to present a complete analysis of what we call "reverse competition" between Magnet and Neigborhood schools and its effect upon the Plan in its entirety.

The actual and potential prejudice to intervenors should their motion be denied derives not only from their obvious interest in the matter, but from the inadequacy of representation their interests have received, and are likely to continue to receive, from both parties. To

deny intervenors's motion would seriously impair--if not eliminate--their ability to protect their constitutionally protected rights. Where such a strong showing of prejudice is evident, it has been held that the timeliness requirement of Rule 24(a) should be minimized. EEOC v. United Airlines; United States v. American Telephone and Telegraph Co.

Finally, in ruling on the timeliness of intervenors' application this Court should also consider the purpose for which intervention is sought. United Airlines Inc. v. McDonald 432 U.S. at 392; United States v. American Telephone and Telegraph Co., 642 F. 2d at 1294; Natural Resources Defense Council v. Costle, 561 F. 2d at 907. Where the proposed intervention, as here, is for the overriding purpose of challenging the constitutionality of the Desegregation Plan and to protect the

individual rights of applicants and others similarly situated under circumstances in which it appears unlikely that intervenor's interests will be adequately represented, intervenors' application should be granted.

2. The applicants claim a direct, substantial and legally protectable interest in the subject matter of the Action.

All applicants are the parents or guardians of minor children aged 3 and 4 years at the time of their exclusion on or about August 1981 from Disney school after having been first accepted on June 1981. They were excluded solely on the basis of a change in "racial quotas" allegedly required by the Chicago Desegregation Plan which lowered the quota to a 35% ceiling for white applicants at all designated Magnet school [sic]. The children that were excluded are whites, American-Indians and Cuban and other minorities. These children remain excluded and were never

readmitted to any public school and were not provided with an equivalent or better alternative for an integrated quality education. Many of these children were placed in private or parochial schools and were completely denied the benefit of a quality integrated education in the Chicago Public school system. These applicants have a direct legal interest in the underlying controversy between the Board and the United States.

These applicants claim that their right to equal sharing in a public quality integrated education in a Unitary School system with equal access for all has been denied and that it continues to be denied by the impermissible "racial quotas" imposed in Chicago by the implementation and application of an unconstitutional Desegregation Plan.

These applicants claim that their unalienable right to freedom from coercion by the State and the Equal Protection of the laws together with their rights to Equal Educational opportunities has been denied and continues to be denied by the implementation and application of an unconstitutional Desegregation Plan imposed in Chicago.

These applicants argue that there is nothing in the consent decree and the Memorandum Opinion and order of this Court, dated January 6,1983, the Opinion, that even remotely justifies the outright exclusion of children from Public schools in Chicago, and further claim that the design and implementation of the Desegregation Plan as a whole is unconstitutional, not only as applied in the particular factual context of Disney, but for the whole Chicago system. This

follows from the fixed "racial quotas" imposed on designated Magnet schools and its synergistic reverse competition effect on the system-wide "at least 30% white-at least 30% minority" which in effect transform the system-wide standard into a disguised impermissible "racial quota".

The interest of applicants is therefore direct, substantial and legally protectable under the subject matter of this lawsuit. In Johnson v. San Francisco Unified Sch. Dist., 500 F 2d 349 (c.A. 9th, 1974), the parents of school children of Chinese ancestry were allowed to intervene to challenge the reassignment of their children. Surely the same reasoning applies to white and minority children in the instant case. Applicants are not applying for intervention to oppose the desegregation action. On the contrary applicants are applying to ensure that the

desegregation action works in a constitutional and permissible manner.

3. Intervenors' Interests and Ability to Protect that Interest May, As a Practical Matter, Be Impaired or Impeded , by Disposition of this Action.

It is perfectly obvious that Intervenors' Interests not only may be, but in fact is, impaired or impeded by the Determination of constitutionality previously made by this Court.

The applicants ability to protect their interests is totally curtailed. Not only are they unable to obtain a remedy before the Honorable Susan Getzendanner but as a practical matter if this court does not grant the Motion for Leave to Intervene so much time will have elapsed that even an appeal to a higher court will not produce any practical results for applicants. Surely the Federal Courts cannot be a part of such a mockery of justice. This Court's

duty is to protect the individual rights guaranteed by the Constitution of the United States against the awesome and abusive power of the whole state. It has never been the duty of the Federal Courts to protect the "rights" of the whole in disregard to the true rights of the individual. Frankly, we feel offended by such a notion, and must react strongly to such an imposition. We grant that affirmative action programs are approved by the Supreme Court of the United States, particularly in the context of public education, but strict scrutiny is still required and strict scrutiny still means strict scrutiny. If the court so applies the yardstick and scrutinizes the record, the facts and the legal theory it cannot but conclude that something is sorely amiss. We stated to the Honorable Susan Getzendanner what we believe justifies

affirmative action programs. We said "... a very limited restriction on liberty becomes necessary in order that the extremes created by racism and segregation do not end up depriving all individuals of their innate 'equal access' and of the minimum [at least...] (emphasis not on original) 'equal sharing' without which neither equality nor freedom can exist." Addendum I, at 23. The unalienable right of freedom of each individual and the principle that said freedom must be maximized by the State, together with the requirement that the suffering of individuals be minimized, and the Equal Protection of the Laws and Equal Educational opportunities of the children compel this result. Nothing in this balancing exercise requires outright deprivation of a constitutional right, nor, as we are sure Judge Shadur will agree, can

justify a system-wide desegregation effort that distributes burdens unequitably between the races or that is in fact designed as a disguised fixed "racial quota" which works as an "arbitrary" floor or ceiling to either maintain or aggravate a present segregative trend or racial imbalance or to hinder the process of school desegregation and which, in reality, is nothing but a hypocritical exclusionary device.

Thus, it is that it is well established that Rule 24 requires the Court to look at the practical consequences of denying intervention. Nuesse v. Camp, 385 F. 2d 649, 702 (D.C. Cir. 1967); Atlantis Development Corp. v. United States, 379 F. 2d 818, 826 (5th Cir. 1966). The intervenors will have no other forum in which to litigate their interest.

This is precisely the type of "impairment of interest" contemplated by Rule 24. The adverse impact of stare decisis standing alone is sufficient to satisfy this requirement. Atlantic Dev. Corp. v. United States, 379 F 2d 818, (CA 5th, 1967); New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York, 516 F 2d 350, (C.A. 2d, 1975); Natural Resources Def. Council v. United States Nuclear Reg. Comm., 578 F 2d 1341, (C.A. 10th 1978); Further, since applicants are members of the class, the settlement consent decree adversely affects their interest, unless they opt to leave the public school system altogether through the much feared "white flight" a result which is precisely what the Desegregation Plan is presumably designed to prevent.

4. The applicants' Interest Is Not Adequately Represented by the Existing Parties.

Rule 24(a) provides that intervention should be granted where intervenors satisfy the requirements of timeliness, interest, and impairment of interest, "unless the applicant's interest is adequately represented by existing parties." F. R. Civ. P. 24(a)(2). The Supreme Court, in Trbovich v. United Mine Workers, 404 U.S. 528 (1972), construed this adequacy of representation requirement quite liberally: the Court held that it is "satisfied if the applicant shows that representation of his interest 'may be' inadequate"; and, further, that "the burden of making that showing should be treated as minimal." 404 U.S. at 538 n.10. See also National Farm Lines v. I.C.C., 564 F. 2d 381, 383 (10th Cir. 1977); Lawrence v. Elsea, 478 F. Supp. 480, 482 (W.D. Wisc. 1979).

In United States v. Board of School Commissioners of Indianapolis, Ind., 466 F. 2d 573, at 575, (7th Cir. 1972), the Court of Appeals set forth its own standard for determining the adequacy of representation:

> [R]epresentation is adequate if no collusion is shown between the representatives and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his duty.

In the case at bar, applicants more than meet their burden. The United States has been aware at all times of the exclusion of the children at Disney, they are aware that the Board of Education was covering up the actions at Disney. Thus see Appendix A, attached to Addendum I, at page v. where the United States remarked:

> "(a) None of these sources, other than the Survey, lists the Disney School (District 3) [sic] as a magnet. . . We do not know why Disney was omitted from the March 25, 1981 documents;"

This statement by the United States was made in spite of the fact that they have an affirmative duty to investigate both under Title VI and under the Desegregation Plan, all Federally funded programs such as Disney. It was made in spite of the fact that the Board must report to the United States the status of Disney under the terms of the covenants, conditions subsequent, and restrictions contained in the Quitclaim Deed dated March 24, 1968, by and between the United States of America, Grantor, the City of Chicago, and the Board of Education of the City of Chicago, quitclaiming a tract of land where Disney is located, situated at 4141 North Clarendon Avenue, Chicago, Illinois, in trust for public education purposes. And In [sic] spite of the fact that Plaintiffs had informed the United States both in

writing and in person of the events occurring at Disney.

This alleged ignorance, occurring at the time that the Board was implementing the unconstitutional "racial quotas" at Disney was kept hidden from this Court, for this Court stated:

> "Now the second school year of implementation has begun. Nothing in the execution of the Plan has been shown to disprove the premises on which it was designed." (Opinion P.7).

Furthermore, there is no question that the Plan has the approval of the United States. The fixed "racial quota" which is being applied to all designated Magnet schools and the disguised fixed "racial quota" effect on a system wide basis is not an oversight. It is an act of cooperation and collusion between the parties to the action which has never been called to the attention of this Court.

Applicants are thus placed in the untenable position of having to rely on two adversaries for representation, should their motion be denied.

The government has demonstrated its lack of interest in all aspects of the Desegregation Plan, from the funding of the same to its lack of initiative to even inquire about the actions of the Board at Disney, much less about the impact and effect of the unconstitutional "racial quotas" being applied in Chicago. This Court has been deprived of information with which it could evaluate the impact of its ruling of constitutionality of the Desegregation Plan. To this day the parties have failed to provide this Court with a single bit of information about Disney or about the impact of reverse competition in minority area schools.

Under such circumstances, as outlined above, intervention is warranted. Trbovich v. United Mine Worker, 404 U.S. at 539.

B. Permissive Intervention is Appropriate

Should the Court deny applicants' Motion for Intervention as of right, applicants should be granted permissive leave to intervene. Rule 24(b) authorizes the Court to permit intervention upon a showing that: 1) the application is timely. 2) the claims have a question of law or fact in common with the main action, and 3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. United States v. Board of School Commissioners of Indianapolis, Ind., 477 F. 2d at 576 (7th Cir. 1972). Further the Court may consider as a relevant factor the potential benefit which the intervenor might derive from becoming a party to the litigation. United

States v. Postal Service v. Brennan, 579 F. 2d 188, 191 (2d Cir. 1978). In addition, the Court may consider "whether parties seeking intervention will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal question presented." Spangler v. Pasadena City Board of Education, 552 F. 2d 1326, 1329 (9th Cir. 1977); Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill., E.S. 1976).

1. Applicants' Motion is Timely

For the reasons stated earlier, the Intervenors' motion for permissive intervention is timely.

2. Applicants' Claims Have a Question Of Law Or Fact In Common With The Main Action.

The United States and the Board must seek to ensure the same purpose of the Desegregation Plan that applicants herein

are seeking, i.e., to provide equal sharing of a quality integrated education in a Unitary School system with equal access for all. Since presumably they share this interest then the two parties and the applicants have a question of law or fact in common.

3. Intervention Will Not Unduly Delay or Prejudice The Adjudication of The Rights of the Original Parties

As stated before, Intervenors do not seek to eliminate the Desegregation Plan. They merely seek to improve it and correct it by presenting to the Court a flaw in its design and implementation. The parties should be grateful, in good faith, that such a flaw can be corrected. The alternative is to violate the rights of the individual participants of the Plan and eventually to revamp the complete Plan when its failure is unavoidable.

Intervenors are not in the position of applicants alleging that the Plan is unconstitutional under any circumstances. That should be obvious for applicants are part of that subset of individuals who voluntarily applied to an integrated school, were accepted, and then "arbitrarily" excluded without any recourse to participate in a public integrated school in Chicago. The interest of the original parties is not prejudiced since their interest is the same as that of the intervenors and a "complete factual record" is what the Supreme Court and this Court requires.

III. CONCLUSION

For the foregoing reasons, Applicants respectfully request that their Motion for Leave to Intervene be granted.

11/27/83

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| CHARLES J. RICHARDS, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | No. 80 C 4261 |
| | ) | |
| JAYNE BYRNE, et al., | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

Plaintiffs have moved for a preliminary injunction, apparently seeking a determination that the racial quotas for the Walt Disney Magnet School improperly excluded white children. The motion has been pending for some time, awating [sic] the decision of Judge Shadur in Johnson v. Board of Education of the City of Chicago, 567 F.Supp. 290 (N.D. Ill. 1983). While Judge Shadur decided the Johnson case July 14, 1983, his decision was not brought to the attention of this court by any of the

parties in this case. When the court became aware of the decision, it informed the parties of the citation for the case by minute order dated November 18, 1983.

The papers filed by the plaintiffs in this case have been difficult to decipher and interpret. The court has recently conducted an extensive in-chambers pretrial conference with the parties in a further effort to understand plaintiffs' attorney's legal position.

The court has concluded that the plaintiffs' claim in this case is the same as, or no better than, the claim in Johnson, and that Judge Shadur's reasoning and conclusion have equal applicability in this case. Judge Shadur's approval of the city-wide school desegregation plan, recently affirmed by the Court of Appeals, precludes attacks on separate facets of the plan. Plainitffs' attack on the quotas at

the Walt Disney Magnet school is such a separate attack and accordingly it must fail.

Therefore, plaintiffs' motion for prelimianry injunction is denied. It is so ordered.

Susan Getzendanner
United States District Judge

December 13, 1983

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable Milton I. Shadur

Cause No. 80 C 5124 Date Dec. 15, 1983

Title of Cause USA -vs- Bd. of Ed. of City of Chicago

Brief Statement of Motion motion for leave to for leave to intervene, or alternatively for leave to file brief amici curiae

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel _____

Representing _____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

Reserve space below for notations by minute clerk

Docketed
Nov 16 1983

Motion for leave to intervene or alternatively, for leave to file a brief amici curiae is denied.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

# STUDENT DESEGREGATION PLAN FOR CHICAGO PUBLIC SCHOOLS: RECOMMENDATIONS ON EDUCATIONAL COMPONENTS

PREPARED FOR THE BOARD OF EDUCATION - CITY OF CHICAGO BY ROBERT L. GREEN, LEAD CONSULTANT, STUDENT DESEGREGATION PROJECT

(Selected Pages)

* * *

## Magnet Schools

RATIONALE

Magnet schools are designed to attract students to a particular environment featuring special programmatic, organizational, or instructional offerings. Magnets are, in essence, a method of concentrating resources, personnel, and students to achieve a desired educational goal that cannot be achieved in a regular school setting.

Because magnet schools may draw students from a broad area, even city-wide, they can make an important contribution to a desegregation effort through the imposition

of requirements for a racially and ethnically balanced student population. This is an attractive technique in a desegregation effort inasmuch as participation is voluntary and students and parents believe that a superior quality education is provided.

Experience around the country indicates that magnets, when used as the sole or primary technique for achieving desegregation, have a very limited impact. In order for voluntary techniques like magnet schools to have a significant effect on a total desegregation effort, the overall plan must incorporate pupil reassignment in some manner.

In a desegregation plan with mandatory provisions, magnet schools can be extremely valuable in addressing both pupil reassignment and educational reform. Magnet schools represent a choice for parents and

students, an alternative to reassignment, and an option for educational experiences structured within a particular programmatic, organizational, or instructional framework.

CURRENT STATUS

The Chicago public schools currently operate a variety of magnet schools and magnet programs within schools, in the sense that a "magnet" is a school or program that offers students an alternative to the regular educational program, and is open to students on a citywide or area-wide basis. These programs may be summarized thus:

- 15 magnet elementary schools enrolling all students full-time in the magnet offering

- 5 capital development board magnet elementary schools

enrolling students from both inside and outside a local attendance area

- 3 magnet high schools drawing all students citywide

- 6 kinds of magnet high schools programs, located in 7 different schools

- 29 magnet elementary program sites, enrolling students for particular program offerings, along with regular program students drawn from the local attendance area

As these figures indicate, the Chicago public school system has a variety of magnet schools and magnet programs in regular schools, both elementary and secondary. Other features also vary: entrance criteria, drawing areas, program designs, and extent of student participation. In short, there is a lack of consistency among the magnet schools, programs, and activities. The sole common characteristic of those schools and programs presently labeled "magnet" is that some of the students come from outside what would normally be considered the school's attendance area.

There is also some confusion in terminology applied to this type of educational offering. Some schools are referred to as "program options" although the exact implications of that term are not clear. There is a need to use terms with more precision and to bring some degree of

uniformity to the magnet offerings of the school system.

It is also important to consider the possible merits of some of the criticisms leveled against magnet schools. Both in Chicago and elsewhere, magnets have been criticized for "skimming" the best students, the best teachers, and a disproportionate share of resources. Another common criticism is that magnets fail to address the needs of educationally disadvantaged children from low SES backgrounds.

There is a need to expand educational alternatives for children who have been, and will continue to be, in racially isolated schools. The implementation of the magnet school concept can help to meet the need.

The following recommendations propose three types of schools under the general term of "magnets":

1. Magnet schools as described by uniform guidelines

2. Special program options that serve a part of a school's population along with a regular instructional program

3. Community Academies located in racially isolated areas and designed to serve the educational needs of children from those areas

## RECOMMENDATIONS

### GENERAL

1. Adopt the following guidelines to which all existing and new regular magnet schools will conform:

   a. Entrance criteria are limited to those actually required by the nature of the program.

   b. Attendance area is established on a city-wide or multi-district basis.

   c. Attendance is required on a full-time, full-year basis.

   d. The magnet school is identified as the home school of students enrolled.

   e. Programs and racial compositions are established consistent with

desegregation standards of the system.

f. Educational offerings are consistent from one unit to another as regards entrance criteria and organizational or curricular design.

g. Staff members for magnet schools are selected by the person or persons responsible for the implementation of the program, and are exempted from displacement on the basis of seniority.

CURRENT PROGRAMS

1. Continue for 1981-1982 all existing magnet schools currently in operation and make any necessary modifications

to conform to the uniform guidelines set forth above.*

2. Assess existing special programs offered to students from outside the established attendance area in terms of desegregation and educational outcomes; establish uniform guidelines for these special programs and modify existing programs to conform to these guidelines.

NEW PROGRAMS

1. Begin planning five to seven elementary Community Academies to be opened as soon as practicable in predominantly black or Hispanic areas.

---

* Recommendation to continue programs does not indicate Board approval of current programs, locations, or racial enrollments.

2. Begin planning two new magnet high schools to be opened as soon as practicable in predominantly black or Hispanic areas.

3. Begin planning up to six new magnet schools, in conformity with the uniform guidelines, to be opened as soon as practicable.

ASSESSMENT AND EVALUATION

1. Continue to address both the assessment and possible modification of current magnet schools, including their location and programs, and the feasibility of establishing new magnets, with respect to:

   a. strengthening current stably desegregated schools
   b. enhancing student desegregation

c. educational outcomes

d. range of offerings

e. attitudinal effects among students, staff, and parents

f. impact on the non-magnet schools

g. cost effectiveness

h. criticisms that magnets draw off the best students and teachers

2. Establish a special study group, composed of district staff and outside specialists selected by the General Superintendent of Schools to conduct an in-depth evaluation of magnet schools and programs.

STAFF DEVELOPMENT

1. Provide inservice training appropriate for the successful implementation of this aspect of the desegregation effort, such training to be

coordinated with the activities described in the Staff Development section of this report.

* * * *

# STUDENT DESEGREGATION PLAN FOR THE CHICAGO PUBLIC SCHOOLS: PART II STUDENT ASSIGNMENT PRINCIPLES, FINANCIAL ASPECTS, GENERAL POLICIES CONCERNING THE DESEGREGATION PLAN

APRIL 29, 1981

This Part II accompanies the Student Desegregation Plan for the Chicago Public Schools: Recommendations on Educational Components, adopted by the Chicago Board of Education on April 15, 1981.

Selected Pages

* * * *

## STUDENT ASSIGNMENT PRINCIPLES

To assure an equal non-separate school system, the Board of Education of the City of Chicago (the "Board") adopts these Student Assignment Principles, all pursuant to the Consent Decree in this case, and as part of the process of developing a complete student desegregation plan. These Student Assignment

Principles shall govern the assignment of students in the Board's schools.

The various requirements and provisions set forth in the Consent Decree (other than the provisions dealing with time requirements) shall govern all aspects of the Principles.

## 1. Definitions

1.1 Stably Integrated Schools. The Board will create, preserve and exempt from mandatory reassignment, schools identified as stably integrated.

1.1.1 A school may initially (by December 31, 1981) be identified by the Board as stably integrated if its enrollment is 30-70% white, or 30-70% minority, and has some history of stability or has become stable.

1.1.2 The Board may later add a school to the category of stably integrated, and exempt it from mandatory reassignment, if through demographic or other factors the school becomes or promises to become stably integrated.

1.1.3 The Board may remove a school from the category of stably integrated, and apply mandatory reassignment techniques to the school, if stability of integration is threatened.

1.1.4 A voluntary transfer student will be regarded as a member of the receiving school for the purpose of determining whether a school is stably integrated.

1.2 Desegregated Schools. A desegregated school is one in which the Board

establishes, by any assignment technique, an enrollment of 30-70% white, or 30-70% minority.

## 2. Voluntary Techniques

2.1 Voluntary Transfers. The Board will adopt affirmative programs of student transfers (with transportation provided as appropriate) in which participation is not compulsory for students.

2.1.1 The Board will encourage, promote and assist voluntary transfers in view of the desirability of voluntary desegregation techniques, the large number of schools remaining predominantly Black, Hispanic and/or overcrowded, and the legal precedent supporting such transfers.

2.1.2 Any student desiring to transfer has the right do so [sic], subject to §5, if the transfer will enhance integration/desegregation at the receiving school and not adversely affect it at the sending school.

2.1.2.1 Any student who meets the foregoing criterion will be permitted to transfer to the school of the student's choice, within the physical and program capacity and admission requirements (if any) of the school.

2.1.2.2 Without limiting the preceding paragraph, the Board will promote voluntary transfers by establishing administrative systems

involving sending and receiving schools or zones or a similar procedure. In doing so, the priority among sending schools will be schools that are overcrowded and schools that are more than 70% Black and/or Hispanic or more than 70% white. The priority for receiving schools will be schools more than 70% white or more than 70% Black and/or Hispanic.

2.1.3 The Board will provide transportation, or reimbursement of the cost of transportation, for voluntary transfer students where the distance from home to school is more than 1 1/2 miles. The Board

reserves the discretion to determine when actual transportation or reimbursement of the cost of public transportation will be provided.

2.2 Magnet Schools. The Board will implement magnet schools pursuant to Part B(3) of the Educational Components. Magnet schools shall contain racial/ethnic goals and management controls to ensure that their racial/ethnic composition achieves integration/desegregation at a level of 15-35% white (65-85% minority) by September 1982, with respect to entering grades, and with respect to other grades to the extent the goal can be achieved without excluding students presently enrolled.

73-267-15

March 28, 1973

WALT DISNEY MAGNET SCHOOL ENROLLMENT POLICY

RECOMMENDATION: Approve the pupil enrollment policy as described in this Board Report to facilitate the opening of the Walt Disney school.

DESCRIPTION: ELIGIBILITY

Attendance at this school will continue to be optional and by application only.

The "magnet" will draw exclusively from all of Area C, except for those students attending the Communication Arts Center, the latter attending on a revolving

basis from other city, suburban, private and parochial schools.

A child whose computer selected number is called after he has moved outside of the attendance area is no longer eligible to enroll.

Siblings of those attending shall not be given preference for admission with the exception of twins and those born within the same twelve month period.

INITIAL SELECTION PROCESS

As a desirable goal, every effort will be made to insure

a heterogeneous mixture of both racial/ethnic and socioeconomic groups. Within each racial/ethnic category there should be a range of socioeconomic groups represented. The socioeconomic guidelines to be utilized are based upon the 1970 United States census occupational classification and education data for Area C.

20% from Category 5 - 1 yr + college or managerial, etc.

30% from Category 4 - 4 yrs high school or sales, etc.

20% from Category 3 - 1-3 yrs high school or operative, etc.

15% from Category 2 - 8 yrs elementary sch. or labor, etc.

15% from Category 1 - less than 8 yrs elementary or non-worker, welfare, etc.

At the present time, there are eight racial/ethnic categories according to the format of the Board of Education's Racial/Ethnic Headcount: White; Black: Spanish-speaking (Mexican-American, Puerto Rican,

Cuban, and other Spanish Surnamed Americans): Oriental and American Indian.

An open enrollment policy has been and will continue to be proclaimed and publicized so that ample applications from each group will be made.

Racial-ethnic percentages are to reflect the proportions represented in the age groups living in the attendance area served by the school. The percentages used will be reviewed from time to time. The Interim School Council developed and the Board of Education's Area C Committee

approved the following policy for use in opening the school:

Percentage goals will reflect the proportions of Chicago public school-age children of each racial/ethnic group in Area C as reported in "Report: Racial Survey-Student, September 19, 1972," prepared by Bureau of Administrative Research, Board of Education, Chicago Public Schools: Caucasian 47.2%; African or Negroid Origin 31.8%; American Indian .5%; Oriental 1.5%; Mexican-American 3.5%; Puerto Rican Origin 12.7%; Cuban Origin

1.5%; other Spanish-speaking Americans 1.3%.

The racial/ethnic goals to be used to open Disney will be 45% white, 30% Black, 10% Spanish, and 6% American Indian and Oriental. Racial/ ethnic goals have been weighted slighted in favor of minority racial-ethnic groups.

ONGOING SELECTION PROCESS

Racial/ ethnic goals will continue to be maintained age by age, and adjustment of incoming students will be made as the composition of Area C varies year by year.

Lists within each Racial/ ethnic category and age will be established from the computer printouts at the time of selection.

Open application periods shall occur annually, and all previous lists will be discontinued. At that time, utilizing the approved enrollment policy bases, new lists will be computer generated for use in filling all vacancies.

Existing waiting lists for the age groups enrolled in the pilot program will be

used to fill the appropriate available openings up to 200. The utilization of these lists will be consistent with established Racial/ ethnic policy. Children on these lists who are not admitted based on waiting list position will be placed in the computer with new applicants thereby insuring a second run.

The following procedure will be followed to locate a child whose number is called: first, he will be called; next, he will be sent a letter giving the parents two weeks to respond; third, the

school-community coordinator will make a home visit to legally verify in writing the family's absence; finally, the next name on the list will be taken.

TRANSPORTATION

Money must continue to be available so that transportation can be offered to all students.

Children already enrolled at Disney whose parents move to a different attendance area within Chicago may continue as students if the parents provide their own transportation either to the

school or to the nearest pickup point.

SUPPORTIVE DATA: Board Report 70-77 dated January 15, 1970. Motion-Re: Disney Magnet School

Board Report 72-500 dated May 11, 1972. Re-Definition of Geographic Boundaries - To Serve All of Area C.

FINANCIAL: No additional cost to the Board of Education at this time.

Respectfully submitted,

James T. Redmond

General Superintendent of Schools

Prepared by:

LORRAINE LA VIGNE, Principal, Walt Disney Magnet School

Approved:

JOHN P. BYRNE, District Superintendent, District 24

ANGELINE P. CARUSO, Associate Superintendent, Area C

EVELYN F. CARLSON, Associate Superintendent, Educational program Planning

MANFORD BYRD, JR., Deputy Superintendent of Schools

Noted:

ROBERT STICKELS, Controller

PRESSMAN & HARTUNIAN, CHTD.
Attorneys At Law
55 East Monroe Street - Suite 4005
Chicago, Illinois 60603

312-372-6475

June 8, 1981

Ms. Martha Jantho
Chair, Desegregation Committee
Chicago Board of Education
3rd Floor, 228 N. LaSalle St.
Chicago, IL 60601

Re: Disney Magnet School

Dear Ms. Jantho:

At the Desegregation Committee consultations on May 20 and June 3, 1981, the question of racial/ethnic composition of Disney Magnet School was discussed. Pursuant to those discussions and information received from staff, this letter sets forth my recommendation concerning the Disney matter.

Staff has provided me with Board Report 73-267-15 (copy attached) and advised me that this is the most recent Board Report concerning Disney School enrollment policy. The last two paragraphs on page 1 and the

first five paragraphs on page 2 establish the policy that "racial/ethnic percentages are to reflect the proportions represented in the age groups living in the attendance area served by the school," and that "adjustment of incoming students will be made as the composition of [the attendance area] varies year by year."

In other words,1 the incoming first grade each year, and students filling vacancies each year in higher grades, are to be selected to reflect the current racial/ethnic proportions of those respective age groups in Disney's attendance area. However, I am advised by staff that this annual adjustment of racial/ethnic composition appears not to have been made since 1973, and that Disney is still operating under the original percentages established in the 1973 Board Report.

At the request of the Desegregation Committee, staff has provided the most recent data on the racial/ethnic composition of public school enrollment in the current Disney attendance area, which is all of the city north of Roosevelt Road (copy attached). The current percentages vary significantly from the 1973 percentages (primarily in a decline of white student composition and an increase of Hispanic student composition.

Based on the 1973 Board Report and the data provided by staff, my recommendations are:

1. That the entering first grade for Disney for September 1981 should reflect the racial/ethnic composition of age group 5 years (the first horizontal line of data on the attached sheet).

2. That students filling any vacancies for September 1981 in higher grades at Disney should be selected so as to cause the composition of each group to more closely reflect the attendance area composition shown by the attached data sheet. Most likely, that will mean selecting Hispanic students.

Upon receiving the statistical data from staff on Friday, June 5, 1981, I indicated the nature of my recommendations to Dr. Springs and Ms. Broomfield, to insure that letter of acceptance were not sent out before this recommendation is acted upon.

This recommendation is based on the 1973 Board Report that has governed Disney School enrollment policy since 1973. Since the attendance area composition is within the range established for magnet schools by the Desegregation Plan, existing policy is consistent with the Plan.

Please advise me if you have any questions or require further information.

Sincerely,

Robert C. Howard

RCH:hm
Enclosures
cc: Dr. Ruth B. Love
Dr. Henry C. Springs
Ms. Mary Broomfield

RACIAL/ETHNIC COMPOSITION OF PUBLIC SCHOOL ENROLLMENT IN DISNEY MAGNET ATTENDANCE AREA
(Based on Student Status Cards as of December 10, 1980, and Broken Down by Age/Grade)

| | | White | | Black | | Hispanic | | American Indian Alaskan Native | | Asian Pacific Islander | | Race Code Missing | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Age | Grade | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % |
| 5 | K | 3,333 | 27.6 | 3,926 | 32.6 | 4,231 | 35.1 | 41 | 0.3 | 524 | 4.3 | 6 | 0 |
| 6 | 1 | 3,159 | 25.5 | 4,263 | 34.4 | 4,312 | 34.8 | 43 | 0.4 | 589 | 4.8 | 17 | 0.1 |
| 7 | 2 | 3,337 | 26.3 | 4,422 | 34.9 | 4,222 | 33.3 | 39 | 0.3 | 630 | 5.0 | 30 | 0.2 |
| 8 | 3 | 3,568 | 27.8 | 4,431 | 34.5 | 4,134 | 32.2 | 56 | 0.4 | 652 | 5.1 | 10 | 0.1 |
| 9 | 4 | 3,874 | 28.4 | 4,801 | 35.2 | 4,260 | 31.3 | 51 | 0.4 | 607 | 4.5 | 29 | 0.2 |
| 10 | 5 | 4,116 | 30.4 | 4,585 | 33.8 | 4,068 | 30.0 | 60 | 0.4 | 706 | 5.2 | 19 | 0.1 |
| 11 | 6 | 4,198 | 32.7 | 4,193 | 32.7 | 3,705 | 28.9 | 54 | 0.4 | 660 | 5.1 | 19 | 0.1 |
| 12 | 7 | 4,126 | 33.9 | 3,899 | 32.0 | 3,523 | 28.9 | 48 | 0.4 | 579 | 4.8 | 13 | 0.1 |
| 13 | 8 | 4,279 | 35.4 | 3,900 | 32.3 | 3,335 | 27.6 | 64 | 0.5 | 494 | 4.1 | 12 | 0.1 |

Facilities Planning
June 3, 1981

82-90-7 April 21, 1982

BOARD OF EDUCATION
CITY OF CHICAGO
228 North LaSalle Street
Chicago, Illinois 60601

OFFICE OF THE PRESIDENT

REPORT OF THE COMMITTEE
ON STUDENT DESEGREGATION

(Selected Pages)

TO THE MEMBERS OF THE BOARD OF EDUCATION
OF THE CITY OF CHICAGO:

The Committee on Student Desegregation met on Wednesday, March 17, 1982, at 9:00 A.M., at the Board of Education Offices, 228 North LaSalle Street, Board Members' Conference Room, Room 320.

* * * *

The Committee reports that on April 14, 1982:

* * * *

2. Staff Recommendation

Approve modification of the Disney Magnet School enrollment policy to bring it into required range for all magnets. It is proposed that an enrollment policy approximately 30% white, 30% black, 30% Hispanic and 6% other, with the remaining 4% to be determined at the discretion of the principal.

Committee Recommendation

Modify - Changing racial composition to conform with all other magnets 65-85% minority and 15-35% white, if this action will not impact negatively on current litigation.

Staff directed to check this with in-house counsel.

* * * *

Respectfully submitted,

Committee on Student Desegregation

(SIGNED) _____
Mrs. Martha J. Jantho, Chairperson

(ABSTAINED) MRS. BETTY BONOW
Mrs. Betty Bonow, Member

(SIGNED) _____
Mr. Luis Salces, Member

# BOARD OF EDUCATION
# OF THE CITY OF CHICAGO
# COMPREHENSIVE STUDENT ASSIGNMENT PLAN
# JANUARY 22, 1982

## Selected Chart

MAGNET
DISNEY

2 DISNEY GR K-8 4140 N. MARINE DRIVE

Capacities: Design 1,620 Program 1,620

ENROLLMENTS

| | 1977 | 1978 | 1979 | 1980 | 1981 |
|---|---|---|---|---|---|
| Membership | 1768 | 1346 | 1360 | 1351 | 1307 |
| %White | 45.6 | 43.5 | 45.0 | 43.9 | 39.6 |
| %Black | 30.1 | 31.1 | 30.0 | 31.8 | 33.3 |
| %Hispn | 19.9 | 18.7 | 19.0 | 17.8 | 20.4 |
| %Other | 4.4 | 6.7 | 6.0 | 6.5 | 6.7 |

PROJECTIONS

| | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|
| Membership | 1300 | 1275 | 1291 | 1311 |
| %White | 35.0 | 35.0 | 35.0 | 35.0 |
| %Black | 30.0 | 30.0 | 30.0 | 30.0 |
| %Hispanic | 30.0 | 30.0 | 30.0 | 30.0 |
| %Other | 5.0 | 5.0 | 5.0 | 5.0 |

Comments:

This is a magnet school. It was built in 1973 and is located in a mixed racial residential area. The school currently is outside the enrollment range established by the Board for magnet schools (15-35% white). The enrollment formula for the school will be adjusted to ensure enrollment within the required range.

# BOARD OF EDUCATION
# OF THE CITY OF CHICAGO
# 1983 ANNUAL DESEGREGATION REVIEW
# APRIL 15, 1983

## Selected Chart

DISNEY MAGNET

Design Capacity: 1620

DISTRICT 2

Program Capacity: 1620

Enrollment by Percentage

| | 1977 | 1978 | 1979 | 1980 | 1981 | 1982 | Change 1981-82 | Plan Projection For 1982 |
|---|---|---|---|---|---|---|---|---|
| Membership | 1768 | 1346 | 1360 | 1351 | 1307 | 1662 | | 1300 |
| White | 45.6 | 43.5 | 45.0 | 43.9 | 39.6 | 33.6 | (6.0) | 35% |
| Black | 30.1 | 31.1 | 30.0 | 31.8 | 33.3 | 31.7 | (1.6) | 30% |
| Hispn | 19.9 | 18.7 | 19.0 | 17.8 | 20.4 | 28.9 | 8.5 | 30% |
| Other | 4.4 | 6.7 | 6.0 | 6.5 | 6.7 | 5.8 | ( .9) | 5% |

Enrollment by Number

| | 1981 | 1982 | Change |
|---|---|---|---|
| Membership | 1307 | 1662 | 355 |
| White | 518 | 558 | 40 |
| Black | 435 | 527 | 92 |
| Hispn | 267 | 481 | 214 |
| Other | 88 | 96 | 8 |

Evaluation: Disney was established as a magnet school in 1973. It originally had an enrollment composition requirement of 45% white, but under the Plan is required to meet the 65-85% minority composition range. Disney is now within that range, at 66.4% minority.

Action: No change is required at Disney.

# STUDENT DESEGREGATION PLAN FOR THE CHICAGO BOARD OF EDUCATION ANNUAL DESEGREGATION REVIEW 1983-84 PART I: STUDENT ASSIGNMENT MAY, 1984

## Selected Chart

DISNEY MAGNET — DISTRICT 2

Design Capacity: 1620 — Program Capacity: 1620

Enrollment by Percentage

| | 1977 | 1978 | 1979 | 1980 | 1981 | 1982 | 1983 | Change 1982-83 |
|---|---|---|---|---|---|---|---|---|
| Membership | 1768 | 1346 | 1360 | 1351 | 1307 | 1662 | 1659 | |
| White | 45.6 | 43.5 | 45.0 | 43.9 | 39.6 | 33.6 | 31.3 | (2.3) |
| Black | 30.1 | 31.1 | 30.0 | 31.8 | 33.3 | 31.7 | 31.8 | 0.1 |
| Hispn | 19.9 | 18.7 | 19.0 | 17.8 | 20.4 | 28.9 | 29.4 | 0.5 |
| Other | 4.4 | 6.7 | 6.0 | 6.5 | 6.7 | 5.8 | 7.5 | 1.7 |

Enrollment by Number

| | 1981 | 1982 | 1983 | Change |
|---|---|---|---|---|
| Membership | 1307 | 1662 | 1659 | ( 3) |
| White | 518 | 558 | 519 | (39) |
| Black | 435 | 527 | 528 | 1 |
| Hispn | 267 | 481 | 488 | 7 |
| Other | 88 | 96 | 124 | 28 |

Evaluation: Disney was established as a magnet school in 1973. It originally had an enrollment composition requirement of 45% white, but under the Plan is required to meet the 65-85% minority composition range. Disney is now within that range, at 68.7% minority.

Action: No change is required at Disney.

# ANNUAL DESEGREGATION REVIEW 1985-86

## Part 1: Review of Student Assignment Component

(Selected Pages)

* * * *

### 2. Magnet-Type Schools and Programs

The types of schools reviewed in this category include educational programs designed to increase the number of students participating in desegregated learning environments. Magnet-type schools and programs include: magnet schools; scholastic academies; metropolitan high schools; and magnet programs within schools.

#### a. Magnet Schools

##### 1) Definition

Magnet schools offer a distinctive curriculum coordinated around a central theme and enroll students citywide.

2) Plan Objectives/ Implementation Strategies

For magnet schools, the primary objective of the Plan is to achieve and maintain a racial/ethnic composition of 15-35 percent white and 65-85 percent minority in the entering grade. With respect to other grades, this enrollment range will be achieved to the extent possible without excluding students presently enrolled. Magnet schools attract students to increase participation in desegregated learning environments.

3) Aggregate Results

The aggregate data for magnet schools specifies that the objective is being achieved. All magnet schools have been generally successful in maintaining and/or substantially improving their overall racial/ ethnic composition. The number of students

participating has continued to increase to the extent possible within the available spaces.

Of the 33 sites in this category, all but seven schools (Decatur, Edison, Gallistel, Near North, the Chicago High School for Agricultural Studies, J. Owens, and Sayre) have achieved enrollments within the required range. Each of these seven schools has been directed to implement a specific action, discussed in the Recommendations on page 60.

As can be observed from the following chart and graph, the percentage of participation of all racial/ethnic categories has remained stable.

# ANNUAL DESEGREGATION REVIEW 1985-86

## Selected Chart

**DISNEY MAGNET** — **DISTRICT 2**

**Design Capacity: 1620** — **Program Capacity: 1620**

## Enrollment by Percentage

| | 1977 | 1978 | 1979 | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Change 1984-85 |
|---|---|---|---|---|---|---|---|---|---|---|
| Membership | 1768 | 1346 | 1360 | 1351 | 1307 | 1662 | 1659 | 1716 | 1731 | |
| White | 45.6 | 43.5 | 45.0 | 43.9 | 39.6 | 33.6 | 31.3 | 27.9 | 28.5 | 0.6 |
| Black | 30.1 | 31.1 | 30.0 | 31.8 | 33.3 | 31.7 | 31.8 | 32.4 | 32.5 | 0.1 |
| Hispn | 19.9 | 18.7 | 19.0 | 17.8 | 20.4 | 28.9 | 29.4 | 31.6 | 29.8 | (1.8) |
| Other | 4.4 | 6.7 | 6.0 | 6.5 | 6.7 | 5.8 | 7.5 | 8.1 | 9.3 | 1.2 |

## Enrollment by Number

| | 1981 | 1982 | 1983 | 1984 | 1985 | Change |
|---|---|---|---|---|---|---|
| Membership | 1307 | 1662 | 1659 | 1716 | 1731 | 15 |
| White | 518 | 558 | 519 | 479 | 493 | 14 |
| Black | 435 | 527 | 528 | 556 | 562 | 6 |
| Hispn | 267 | 481 | 488 | 542 | 515 | (27) |
| Other | 88 | 96 | 124 | 139 | 161 | 22 |

Evaluation: Disney continues to enroll students in accordance with the required range for magnet schools (15-35% white, 65-85% minority) with a stable and consistent tri-ethnic balance.

Action: No change is required at Disney

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1503

**In The**

**SUPREME COURT OF THE UNITED STATES**
**March Term, 1987**

Marco Samayoa, et al.,
***Petitioners***

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
***Respondents***

# APPELLANTS' RESPONSE ON THE ISSUE OF MOOTNESS

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*Attorney for Petitioners*

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NO. 86-1503

In The
SUPREME COURT OF THE UNITED STATES
March Term, 1987

MARCO SAMAYOA, et al.

Petitioners,

vs.

CHICAGO BOARD OF EDUCATION, et al.,

Respondents.

**APPELLANTS' RESPONSE ON THE ISSUE OF MOOTNESS**

On January 22, 1988, this court directed Plaintiffs to discuss the issue of mootness under Art. III, Section 2 of the United States Constitution. Plaintiffs present the following discussion:

## I. Plaintiffs Can And Should Be Reinstated To Walt Disney Magnet School.

> "Any person turned away by the government on account of his race is entitled to a respectful hearing by a court, a hearing at which the government must supply a powerful justification. Chicago has not offered a justification, and the plaintiffs in this case have not received their due from this court." Dissent to the petition for rehearing en banc (App. B, of the Petition for a Writ of Certiorari).

The exclusion of the Children-Plaintiffs is still in effect. The children have not been reinstated and there is no allegation by the Defendants that the Desegregation Plan is no longer in effect. There is no voluntary cessation of the exclusion or transfer practices that are the subject of this litigation.

None of the excluded students have yet graduated and all stand ready to go back to Disney.

All the Plaintiffs are perfectly capable of entering the school if reinstated. None of them have moved out of the area, and all of them are in contact with counsel for the Plaintiffs. The 3 and 4 year old children who are now 9 and 10 will enter the 4th and 5th grade and will receive the benefit of the remaining 3 or 4 years of enriched education which Walt Disney Magnet School can provide and for which they were accepted in the first place.

The present effect of the exclusion by the implementation of the Desegregation Plan has not been arrested by any events, as evidenced by the fact that children remain excluded. There is no change of applicable law. The implementation of the Desegregation Plan continues to transfer and to exclude Plaintiffs and many other children every year. The yearly modifications of the consent decree and the continued use of certain impermissible racial quotas continues to have an

impact on the parties such that the case remains alive and is not moot.

**II. The Case Is Not Moot Because Plaintiffs' Have A Personal Stake In The Outcome Of The Controversy.**

There is a full record of the facts of the dispute. The proceeding is clearly adversarial and Plaintiffs have standing and an opposing personal interest to Defendants. Defendants have not ceased the challenged implementation of the Desegregation Plan thus arresting the present effect on Plaintiffs and eliminating the risk of recurrence. The Plaintiffs could even bring their suit now since the principle contended for is still being violated and the children remain excluded. Plaintiffs have a continuing interest. Since there is adverse interest which can be remedied by reinstatement,

an effective remedy can be imposed by this court.

**III. The Supreme Court Can Carry Out An Effective Remedy.**

This court can order both prospective relief such as an injunction and mandamus, and retrospective relief such as damages which are claimed by Plaintiffs.

The effect of the court remedy will be felt on Plaintiffs and on other litigants and in other situations upon persons similarly situated who are denied admission. Such remedy will affect not just possible future adverse effects but in fact actual continuing adverse effects upon Plaintiffs.

**IV. Plaintiffs' Seek Both Injunction And Damages Resulting In A Justiciable Issue That Is Not Moot.**

The Plaintiffs do not only seek an injunction, but seek the awarding of actual and punitive damages and attorney's fees against Defendants under 42 USC Sec. 1983 (as is the case since they went to private pre-kindergarten schools not available in Chicago and had to assume additional tuition, transportation and pre-enrollment medical and other expenses) which results in a justiciable issue that is not rendered moot. See DeFunis v. Odegaard, 416 U.S. 312.

Whether we assume arguendo either that Plaintiffs have been reinstated or that they are no longer available for reinstatement, Plaintiffs have not been made whole since they paid out monies which they would not have

disbursed had they been admitted originally. In addition they have been deprived of the first 7 years of a unique and enriched education at one of the best elementary schools in the city. In addition, the 5 and 6 year old children who were readmitted as a result of this lawsuit have not yet been made whole; their claim for monetary damages has not yet been honored.

The complaint unambiguously requests damages. See opinion of the Seventh Circuit Court of Appeals, 789 F. 2nd 1046, (Appendix A, Petition for a Writ of Certiorari). The amount of money at stake does not determine the mootness and as long as Plaintiffs have a concrete interest in the outcome of the litigation the case is not moot. Firefighters v. Stotts, 467 U.S. 561 at 571. If the case were moot and the judgment of the Court of Appeals is not reversed, the exclusions would be lawful, and the Defendants would not pay out any

money to which the Plaintiffs had no legal right.

**V. The Case Is Not Moot Because Plaintiffs Ask For Declaratory Judgment Based On An Actual Controversy.**

Plaintiffs have asked for declaratory relief, which depends on the existence of an "actual controversy". Thus the interests of the parties should be scrutinized.

The denial of due process and equal protection of the laws that started with the exclusion of Plaintiffs from the school is still present. The standard of Strict Judicial scrutiny was never applied and in questions of race the manner in which the government applies the law is of great concern.

Neither the District, the Appellate nor the Supreme Court have ruled on one of the most

important and crucial principles advanced by Plaintiffs: that preferential forms of affirmative action are constitutional if (1) said preferences have a compelling governmental purpose, (2) they are relevant and necessary to the achievement of said governmental purpose, and (3) they do not create unacceptable hardships and suffering on identifiable individuals.

The principle contended for by Plaintiffs that Defendants have no power to exclude without a compelling justification has a present and future adverse effect on Plaintiffs.

The court must resolve such a corrosive legal situation by means of effective relief which "declares the rights and other legal relations" of the parties.

Without a declaratory judgment, the possibility of adverse governmental action in excluding the children keeps the controversy

alive, and hence, keeps the case justiciable especially where the fundamental freedom of choice is suppressed. A determination by this court of the legal issues tendered is necessary to compel the readmission of the children to the school and to prevent the chilling effect on the parents who may be discouraged from trying to exercise their protected freedom.

**VI. The Dispute Is "Capable Of Repetition, Yet Evading Review."**

The possibility of future recurrence of the dispute is always present since there are no changes that affect the past, present and future adverse effects on the Plaintiffs and nothing prevents the continued recurrence of the dispute. An obvious example of this is Johnson I, and Johnson II (See Petition for a Writ of Certiorari at page A26) which are repetitive

appeals to the Supreme Court. In all cases the same defendant is a recurring litigant as in our case.

Since the minor children have not outgrown the possibility of reinstatement, the future effect is not speculative and the "mere possibility [of recurrent violation] . . . serves to keep the case alive." U.S. v. W.T. Grant Co., 345 U.S. 629 at 633. Furthermore, the certainty of the possibility of the recurrence of the dispute will bring the same two parties before the court.

There is a substantial likelihood that the issues will always return to the court in the same condition because of the inherent nature of the issue, since in other cases the children do not start at the early ages of 3 or 4 as they do in this case.

This kind of case such as the Bakke, DeFunis and Johnson case appear to be inherently

evasive of review. They take a very long time to resolve. They are the type of disputes which have come to be known as "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498. Because the children started very early in the Disney case, they have not yet outgrown the case and their continuing exclusion is not just a possibility but is in effect a certainty. When this is coupled with the public importance of the ruling on the issue of affirmative action in public schools it is clear that Plaintiffs have a sufficient interest in the litigation and that the case is not moot. Such an application is not an expansion of the scope of Southern Pacific Terminal Co. v. ICC, cited above; rather, it is an additional assurance that preserves the quality of judicial review and fulfills its purpose. The need for its resolution reflects a continuing controversy

in the federal-state area. Moore v. Ogilvie, 394 U.S. 814 at 816.

**VII. The Case Presents A Federal Constitutional Issue Of Great Public Importance Presented In An Adversarial Setting.**

In general the potential challengers of the unlawful exclusions are not a cohesive group, and individual persons are not in a position to resist the underlying question of unconstitutional exclusion. See the cases dealing in the area of welfare law where defendants usually attempt to defeat review by granting the benefit when faced with a suit. See Jackson v. Department of Public Welfare, 2 CCH Pov. L. Rep. Par. 10,170. An effective remedy should provide for all people against repetitions of unconstitutional conduct at a level where most people are unable to finance a

protracted litigation.

The Supreme Court has asserted the relevance of public interest in the mootness determination. See, e.g., U.S. v. W.T. Grant Co., 345 U.S. 629. Avoidance of repetitious litigation serves the public interest. Said repetitious litigation provides the evidence of the subsistent existing controversies that will not disappear and underscores the very important constitutional questions presented, see DeFunis v. Odegaard, Id. at 350, particularly where the stakes of the litigating parties assure the adversarial quality of the litigation and preclude the frustration of the last avenue of judicial review.

## CONCLUSION

Petitioners submit that for the aforesaid reasons the Walt Disney Magnet School case is not Moot and further that the court should decide the case on its merits and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 86-1503

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
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# In The
# Supreme Court of the United States
## October Term, 1987

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**MARCO SAMAYOA, et al.,**

*Petitioners,*

*vs.*

**CHICAGO BOARD OF EDUCATION, et al.,**

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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## RESPONDENTS' MEMORANDUM ON MOOTNESS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO. 86-1503

MARCO SAMAYOA, ET AL.,

Petitioners,

vs.

CHICAGO BOARD OF EDUCATION, ET AL.,

Respondents.

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# RESPONDENTS' MEMORANDUM ON MOOTNESS

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Respondents, the Board of Education of the City of Chicago, et. al (the "Board"), at the request of the Court, submit this supplemental memorandum on the issue of mootness.

## STATEMENT OF THE CASE RELATING TO MOOTNESS

This case is before the Court on plaintiffs' appeal of the dismissal of Count I of the Fourth Amended Complaint ("Complaint"), the only Count which has

not previously been finally disposed. Count I alleges claims based on constitutional and statutory rights of freedom of association, due process and equal protection.

The Board has previously addressed the mootness of these claims as part of its Brief in Opposition to the Petition for a Writ of Certiorari. This Memorandum provides limited further discussion of the two principal circumstances which make this claim moot: (1) the Complaint concerns a one-time aberration which cannot be repeated, and (2) plaintiffs are no longer eligible for the program to which they seek admission because they are now older than pre-kindergarten age.

A. Facts Concerning Whether The Issues Presented Remain Live

The factual allegations of the Complaint (accepted as true for these purposes) relate solely to the disposition of plaintiffs' applications for admission to Disney School under the system in effect in 1981. (R.App. 374a).[1] That admissions process ended when, in 1982, a new systemwide enrollment plan was developed as part of the Board's Desegregation Plan. (R.App. 526a).

Student selection at Disney for school year 1981-82 was conducted

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[1]The following abbreviations for citations are used in this brief: "R.App." refers to Respondents' Appendix; "Pet.App." refers to Petitioners' Appendix; "Petition" refers to the plaintiffs' Petition for a Writ of Certiorari.

pursuant to a 1973 Board Report. (R.App. 507a). That report set a racial/ethnic enrollment composition for the year 1973, based on the racial, ethnic and socio-economic composition of the limited Disney attendance area on the north side of Chicago. The 1973 report called for annual revisions for future classes to reflect changes over time in the area's racial/ethnic composition. (R.App. 507a).

Under this admissions system, plaintiffs applied for admission to the pre-kindergarten program at Disney for school year 1981-82. (R.App. 377a). For reasons not of record, the enrollment composition set in 1973 had not been annually revised and was still in effect in 1981. (R.App. 519a). Plaintiffs

received letters of acceptance based on the 1973 enrollment proportions.

However, in June 1981, the Board reviewed the 1973 enrollment proportions and revised them to conform with the 1981 racial/ethnic composition of the Disney attendance area. (R.App. 520a-521a). Plaintiffs were notified of the 1981 revisions, the reasons for them, and that as a result of the revisions they would not, in fact, be admitted. (R.App. 422a).

Plaintiffs were also informed that they might be eligible for admission to Disney in following years. (R.App. 422a). However, the record contains no evidence, and the Complaint does not allege, that plaintiffs made any further

attempts to apply for admission to Disney.

The only subject of the Complaint is this 1981 admissions system. (R.App. 374a). Plaintiffs complain about the determination of enrollment composition based on local demographics, the revision, and the procedures which resulted in acceptance letters but not admission. (R.App. 374a).

In 1982, after these events which are the subject of the Complaint had occurred, the 1981 admissions system was replaced. (R.App. 526a). The Board developed and began implementing a systemwide Desegregation Plan which included designation and operation of magnet schools, including Disney. (R.App. 487a, 500a, 526a). In compliance

with the Desegregation Plan, the Board replaced the 1981 admissions system particular to Disney with the systemwide enrollment guidelines applicable to all magnet schools. (R.App. 526a). Under the Desegregation Plan, the enrollment guidelines establish a range (rather than a fixed percentage), are not subject to annual revision, and are not directly tied to the racial/ethnic composition of any local attendance area, the school system, or any other population (instead reflecting several Desegregation Plan considerations). (R.App. 506a). Of course the implementation procedures are different, and have not repeated the acceptance but non-admission phenomenon.[2]

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[2]Even under the 1981 system, the events complained of were a one-time aberration. The post-acceptance, pre-

The magnet school enrollment system has not been changed in the six years since 1982 and will continue unchanged as part of the Desegregation Plan. (R.App. 528a-543a).

B. Facts Concerning Whether Plaintiffs Have A Legally Cognizable Interest

The allegations of the Complaint relate solely to plaintiffs' exclusion in 1981 from Disney's pre-kindergarten program. At that time, plaintiffs were all allegedly 3 and 4

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admission change in Disney's racial/ethnic proportions was a unique occurrence. It did not happen in any other year, even under the 1981 system, and it cannot happen under the Desegregation Plan presently in effect. (R.App. 519a).



years old.[3] (R.App. 376a). Thus, they are now 10 and 11 years old, not eligible for pre-kindergarten. Further, there is no allegation that they would still be attending Disney now if they had been admitted to the pre-kindergarten program.

REASONS WHY PLAINTIFFS' CLAIM IS MOOT

Mootness occurs under either of two circumstances: (1) the issues presented are no longer "live"; or (2) the parties lack a legally cognizable interest in the outcome. United States Parole Commission v. Geraghty, 445 U.S.

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[3]Although the Fourth Amended Complaint alleges that the action is being brought on behalf of a class, there never have been any proceedings to have a class certified. In fact, plaintiffs' counsel has conceded that this case is not a class action and that he represents plaintiffs only in their individual capacities. (Pet. App. 40)

388, 396 (1980). Both these circumstances are present here.

I.

The Issues Presented In The Fourth Amended Complaint Are No Longer Live

Plaintiffs' exclusion from Disney's pre-kindergarten program in 1981 was an aberration due to a one-time, post-acceptance, pre-enrollment revision of the school's racial/ethnic proportions. That one-time change took place under an admissions system which was wholly superceded in 1982 by the Desegregation Plan. Thus, the alleged offending 1981 Board conduct permanently ceased long ago: plaintiffs' claim is no longer live.

A case becomes moot where the allegedly illegal action ceases, includ-

ing particularly where the guidelines under which the illegal action is authorized have been repealed or modified so that the offending provisions are no longer effective. United States Department of Treasury v. Galiato, ___ U.S. ___, 106 S.Ct. 2683, 2686 (1986) (case moot where statute amended to eradicate offending provision); Princeton University v. Schmid, 455 U.S. 100, 103 (1982) (case moot where university regulation amended to eliminate the provision upon which the claim was based).[4] This is true even where

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[4]There is a limited exception to this rule where the action is "capable of repetition, yet evading review." However, to come within this exception (1) the challenged action must have been too short in duration to be fully litigated prior to cessation and (2) there must be some reasonable expectation that the same complaining party will be

cessation is voluntary, if there is no reasonable expectation that the alleged wrong will be repeated. Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 72 (1983).

Here, plaintiffs complain about the details of implementation of a 1981 admissions system which was replaced in 1982. The new enrollment plan, as part of the Desegregation Plan, entirely differs in its development and justification, in its requirements, and, consequently, in its implementation. It does not have the implementation details present in the 1981 admissions process

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subjected to the same action again. Weinstein v. Bradford, 423 U.S. 147, 149 (1975). As is clear from the discussion herein, plaintiffs' claim does not satisfy these criteria.

about which plaintiffs complain.[5] For example, the new plan includes enrollment ranges applicable uniformly to all magnet schools, which are not directly tied to racial/ethnic composition of population and are not subject to change from year to year.

This Desegregation Plan was developed in response to extensive findings by the United States (R.App. 26a, 43a) which culminated in the filing of its complaint against the Board alleging systemwide segregation. (R.App. 136a). The required enrollment plan which superceded the 1981 system at Disney has been in effect without change for six years, implemented throughout the

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[5]Plaintiffs did not later apply, and so were not subjected to, the new enrollment plan.

system, pursuant to a binding Consent Decree (R.App. 150a), under court supervision.

Plaintiffs complain about the peculiar details of a one-time adjustment to the admissions system at Disney in 1981 that occurred after acceptance but before admission, that affected only a few students during a single year, and that has not and cannot recur. Plaintiffs have admitted that had they not been accepted they would have no claim. (Petition 24) Since the admission process about which plaintiffs complain has been permanently replaced by an entirely different system under which post-acceptance, pre-admission changes cannot occur (and to which plaintiffs have not subjected themselves), the

allegedly offensive conduct has ceased, and plaintiffs' claim is moot.

II.

The Parties No Longer Have A Legally Cognizable Interest In The Outcome

Plaintiffs, who were 3 and 4 years old in 1981, are now ages 10 and 11. They obviously no longer wish to attend the pre-school programs. Thus, since they are no longer eligible for admission to Disney's pre-kindergarten program, they lack a legally cognizable interest in the outcome of their claims.

A claim is moot where plaintiffs can no longer be affected by the actions complained of, Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) (appeal in school desegregation case moot as to the students who had

graduated from the school system and their parents); Board of School Commissioners of the City of Indianapolis v. Jacobs, 420 U.S. 128 (1975) (suit challenging school board regulations moot as to students who had graduated from the school system); DeFunis v. Odegaard, 416 U.S. 312 (1974) (case moot as to student who was in his last semester of law school and would never again go through the law school admissions process). With regard to suits brought as class actions, if the named plaintiffs can no longer be affected, a claim is moot unless the class has been certified. Jacobs, 420 U.S. at 129.

In this case, plaintiffs' Complaint only raises issues about the 1981 admissions process for pre-

kindergarten classes at Disney, and plaintiffs can no longer be affected by that process. The factual allegations do not address the effect of the new enrollment plan on current applicants to pre-kindergarten or the effect of the 1981 program on applicants to any grade above pre-kindergarten. The Complaint is void of any attempt to represent these concerns.

Finally, the Complaint's class allegations do not save this case from mootness. The original Complaint in this case was filed in 1980, reaching its final form as the Fourth Amended Complaint in 1982. Never in the past seven years have plaintiffs even attempted to have a class certified. Thus, under Jacobs, since the individual

plaintiffs no longer have an interest, the claim is moot. Further, plaintiffs' counsel has affirmatively stated that this action is being brought only on behalf of the plaintiffs in their individual capacities. (Pet.App. at 40).

Since these individuals no longer have a legally cognizable interest in, and can no longer be affected by, the outcome of this litigation, their claim is moot.

## CONCLUSION

For the foregoing reasons, plaintiffs' claim is moot. In keeping with the established practice of this Court in disposing of civil cases which have become moot, the opinion of the Court of Appeals for the Seventh Circuit should be vacated and this case should be

remanded to the District Court with a direction to dismiss. See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

Respectfully submitted,

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